No. 16-1454	
Title:	**Ohio, et al., Petitioners** **v.** **American Express Company, et al.**
Docketed:	June 6, 2017
Linked with 16A923	
Lower Ct:	United States Court of Appeals for the Second Circuit
Case Numbers:	(15-1672)
Decision Date:	September 26, 2016
Rehearing Denied:	January 5, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Mar 22 2017	Application (16A923) to extend the time to file a petition for a writ of certiorari from April 5, 2017 to May 5, 2017, submitted to Justice Ginsburg.
Mar 24 2017	Application (16A923) granted by Justice Ginsburg extending the time to file until May 5, 2017.
Apr 20 2017	Application (16A923) to extend further the time from May 5, 2017 to June 2, 2017, submitted to Justice Ginsburg.
Apr 24 2017	Application (16A923) granted by Justice Ginsburg extending the time to file until June 2, 2017.
Jun 02 2017	Petition for a writ of certiorari filed. (Response due July 6, 2017)
Jun 13 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for State petitioners Ohio, Connecticut, Idaho, Illinois, Iowa, Maryland, Michigan, Montana, Rhode Island, Utah and Vermont.
Jun 16 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent Texas.
Jun 19 2017	Waiver of right of respondent State of Tennessee to respond filed.

Jun 22 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent United States.
Jun 22 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondents American Express Company, et al.
Jun 22 2017	Consent to the filing of amicus curiae briefs, in support of either party or neither party, received from counsel for respondent State of Arizona.
Jun 23 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent State of Nebraska.
Jun 26 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent State of Missouri.
Jun 28 2017	Order extending time to file response to petition to and including August 7, 2017, for all respondents.
Jul 06 2017	Order further extending time to file the response of American Express Company, et al. to petition to and including August 21, 2017.
Jul 06 2017	Brief amici curiae of Ahold U.S.A., Inc., et al. filed.
Jul 06 2017	Brief amici curiae of John M. Connor, et al. filed.
Jul 06 2017	Brief amicus curiae of Discover Financial Services filed.
Jul 06 2017	Brief amicus curiae of Retail Litigation Center, Inc. filed.
Jul 06 2017	Brief amici curiae of Former Federal Antitrust Officials filed.
Jul 06 2017	Brief amicus curiae of Southwest Airlines Co. filed.
Jul 06 2017	Brief amicus curiae of United States Public Interest Research Group Education Fund, Inc. filed.
Jul 06 2017	Brief amici curiae of 25 Professors of Antitrust law filed.
Aug 07 2017	Brief of respondent United States in opposition filed.
Aug 21 2017	Brief of respondent American Express Company in opposition filed.

Sep 05 2017	Reply of petitioner Ohio, et al. filed. (Distributed)
Sep 06 2017	DISTRIBUTED for Conference of 9/25/2017.
Oct 02 2017	DISTRIBUTED for Conference of 10/6/2017.
Oct 10 2017	DISTRIBUTED for Conference of 10/13/2017.
Oct 16 2017	Petition GRANTED.
Oct 24 2017	Blanket Consent filed by petitioners Ohio, et al.
Nov 01 2017	The time to file the joint appendix and petitioners' brief on the merits is extended to and including December 7, 2017.
Nov 01 2017	The time to file respondents' briefs on the merits is extended to and including January 16, 2018.
Nov 13 2017	Blanket Consent filed by Respondent, United States **Blanket Consent**
Nov 21 2017	Blanket Consent filed by Respondents, American Express Co., et al. **Blanket Consent**
Nov 21 2017	Blanket Consent filed by Respondent, State of Missouri **Blanket Consent**
Dec 07 2017	Brief of respondent United States in support of petitioners filed. **Main Document** **Certificate of Word Count**
Dec 07 2017	Joint appendix filed. (Statement of costs filed.) **Main Document**
Dec 07 2017	Brief of petitioners Ohio, et al. filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 12 2017	Blanket Consent filed by Respondent, State of Tennessee **Blanket Consent**
Dec 13 2017	Blanket Consent filed by Respondent, State of Nebraska **Blanket Consent**

Dec 14 2017	Brief amici curiae of 20 Merchants as Amici Curiae in Support of Petitioners filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 14 2017	Brief amicus curiae of The Australian Retailers Association filed. **Main Document** **Proof of Service**
Dec 14 2017	Brief amici curiae of Ahold U.S.A., Inc.; Albertsons LLC; The Great Atlantic and Pacific Tea Company, Inc.; H.E. Butt Grocery Co.; Meijer, Inc.; Publix Super Markets, Inc.; Raley's; Rite Aid Corporation; Safeway, Inc.; Supervalu, Inc.; and Walgreen Co. filed. **Main Document** **Proof of Service**
Dec 14 2017	Brief amici curiae of International Air Transport Association and Airlines for America filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 14 2017	Brief amicus curiae of Discover Financial Services filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 14 2017	Brief amici curiae of United States Public Interest Research Group Education Fund, Inc.; Center for Responsible Lending; Consumer Federation of America; Consumers Union; National Association of Consumer Advocates; National Consumer Law Center; Public Citizen, Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 14 2017	Brief amicus curiae of Verizon Communications Inc. in support of neither party filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 14 2017	Brief amici curiae of New York, Alaska, California, Delaware, Hawai'i, Indiana, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, New Mexico, North Carolina, Oregon, Pennsylvania, South Carolina, Washington, Wisconsin, and the District of Columbia filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 14 2017	Brief amicus curiae of American Antitrust Institute filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 14 2017	Brief amici curiae of John M. Connor, et al. filed. **Main Document** **Proof of Service**
Dec 14 2017	Brief amici curiae of Wal-Mart Stores, Inc., The Home Depot, Inc., Target Corporation, Sears Holding Management Corporation, Jo-Ann Stores, LLC, and Merchant Trade Associations filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 14 2017	Brief amicus curiae of Open Markets Institute filed.

	Main Document **Certificate of Word Count** **Proof of Service**
Dec 14 2017	Brief amicus curiae of The Merchant Advisory Group filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 14 2017	Brief amici curiae of American Medical Association and Ohio State Medical Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 14 2017	Amicus brief of 27 Professors of Antitrust Law not accepted for filing. (December 15, 2017)
Dec 14 2017	Brief amici curiae of 28 Professors of Antitrust Law filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 20 2017	SET FOR ARGUMENT ON Monday, February 26, 2018.
Jan 05 2018	CIRCULATED
Jan 10 2018	Record requested from the U.S.C.A. 2nd Circuit.
Jan 16 2018	Record received from the U.S.C.A. 2nd Circuit is electronic.
Jan 16 2018	Brief of respondents American Express Co., et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 17 2018	Motion for divided argument filed by the Solicitor General. **Proof of Service** **Main Document**
Jan 18 2018	Record received from the U.S.C.A. 2nd Circuit 1 box, this record is Sealed.
Jan 23 2018	Brief amicus curiae of Computer & Communications Industry Association filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Jan 23 2018	Brief amicus curiae of The Australian Taxpayers' Alliance filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 23 2018	Brief amicus curiae of Pharmaceutical Research and Manufacturers of America filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 23 2018	Brief amici curiae of Prof. David S. Evans and Prof. Richard Schmalensee filed. (Distributed)

	Main Document **Certificate of Word Count** **Proof of Service** **Other**
Jan 23 2018	Brief amicus curiae of The Clearing House Association L.L.C. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 23 2018	Brief amici curiae of Antitrust Law & Economics Scholars filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service** **Other**
Jan 23 2018	Brief amici curiae of J. Gregory Sidak and Robert D. Willig filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 12 2018	Reply of petitioners Ohio, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 14 2018	Record received from the U.S. Dist. Court Eastern Dist. of New York. The record has some Sealed Documents and is electronic.
Feb 15 2018	Reply of respondent United States filed. (Distributed) **Proof of Service** **Main Document**
Feb 16 2018	Motion for divided argument filed by the Solicitor General GRANTED.
Feb 26 2018	Argued. For petitioners and state respondents in support: Eric E. Murphy, State Solicitor, Columbus, Ohio. For respondent United States in support of petitioners: Malcolm L. Stewart, Deputy Solicitor General, Department of Justice, Washington, D. C. For respondents: Evan R. Chesler, New York, N. Y.

NAME	ADDRESS	PHONE
Attorneys for Petitioners		
Eric E. Murphy Counsel of Record	30 East Broad Street 17th Floor Columbus, OH 43215 eric.murphy@ohioattorneygeneral.gov	(614)-466-8980
Party name: Ohio, et al.		
Attorneys for Respondents		
Nancy Bonnell Counsel of Record	Antitrust Unit Chief Office of the Arizona Attorney General 1275 West Washington Street Phoenix, AZ 85007-2926 Nancy.Bonnell@azag.gov	(602) 542-7728

Party name: State of Arizona

Evan R. Chesler Counsel of Record	Cravth, Swaine & Moore, LLP 825 Eighth Avenue New York, NY 10019 echesler@cravath.com	212-474-1000

Party name: American Express Co., et al.

Noel J. Francisco Counsel of Record	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 SupremeCtBriefs@USDOJ.gov	202-514-2217

Party name: United States

Scott A. Keller Counsel of Record	Office of the Texas Attorney General Solicitor General P.O. Box 12548 (MC 059) Austin, TX 78711-2548 scott.keller@oag.texas.gov	5125902655

Party name: State of Texas

David Andrew Lopez Counsel of Record	Office of the Nebraska Attorney General 2115 State Capitol Lincoln, NE 68509 dave.lopez@nebraska.gov	402-471-2682

Party name: State of Nebraska

Joseph Schlotzhauer Counsel of Record	Assistant Attorney General Missouri Attorney General's Office P.O. Box 861 St. Louis, MO 63188 Joseph.Schlotzhauer@ago.mo.gov	314 340-7945

Party name: State of Missouri

Joseph F. Whalen Counsel of Record	Associate Solicitor General 500 Charlotte Avenue Nashville, TN 37243 joe.whalen@ag.tn.gov	(615) 741-3499

Party name: State of Tennessee

David M. Ashton	Assistant Attorney General P.O. Box 12548 Austin, TX 78711-2548 david.ashton@texasattorneygeneral.gov	512-463-2100

Party name: State of Texas

Douglas J. Peterson	Attorney General	402-471-3297

Office of Attorney General
2115 State Capitol Building
Lincoln, NE 68509

collinkessner@nebraska.gov

Party name: State of Nebraska

Other

Donald I Baker
Counsel of Record

Baker & Miller PLLC
2401 Pennsylvania Ave. NW
Suite 300
Washington, DC 20037

202-663-7820

dbaker@bakerandmiller.com

Party name: International Air Transport Association and Airlines for America

Anthony Joseph Bolognese
Counsel of Record

Bolognese & Associates, LLC
1500 JFK Blvd., Suite 320
Philadelphia, PA 19102

215-814-6750

abolognese@bolognese-law.com

Party name: JOHN M. CONNOR, MARTIN GAYNOR, DANIEL MCFADDEN, ROGER NOLL, JEFFREY M. PERLOFF, JOSEPH A. STIGLITZ, LAWRENCE J. WHITE, AND RALPH A. WINTER

Richard M. Brunell
Counsel of Record

American Antitrust Institute
1025 Connecticut Ave.
Suite 1000
Washington, DC 20036

202-600-9640

rbrunell@antitrustinstitute.org

Party name: American Antitrust Institute

Matthew L. Cantor
Counsel of Record

Constantine Cannon LLP
335 Madison Ave.
New York, NY 10017

2123502738

mcantor@constantinecannon.com

Party name: American Medical Association and Ohio State Medical Association

Eric F. Citron
Counsel of Record

Goldstein & Russell, P.C.
7475 Wisconsin Ave., Suite 850
Bethesda, MD 20814

301-857-1005

ecitron@goldsteinrussell.com

Party name: 27 Professors of Antitrust Law

Deepak Gupta
Counsel of Record

Gupta Wessler PLLC
1900 L Street, NW
Suite 312
Washington, DC 20036

(202) 888-1741

deepak@guptawessler.com

Party name: Open Markets Institute

Jonathan M. Jacobson Counsel of Record	Wilson Sonsini Goodrich & Rosati, P.C. 1301 Avenue of the Americas, 40th Floor New York, NY 10019 jjacobson@wsgr.com	212-497-7758

Party name: Antitrust Law & Economic Scholars

Robert N Kaplan Counsel of Record	Kaplan Fox & Kilsheimer LLP 850 Third Ave.,14th Floor New York, NY 10022 rkaplan@kaplanfox.com	212-687-1980

Party name: The Australian Retailers Association

Neal Kumar Katyal Counsel of Record	Hogan Lovells US LLP 555 Thirteenth St., N.W. Washington, DC 20004 neal.katyal@hoganlovells.com	202 637 5528

Party name: Computer & Communications Industry Association

Elai E Katz Counsel of Record	Cahill Gordon & Reindel LLP 80 Pine Street New York, NY 10005 ekatz@cahill.com	212-701-3039

Party name: Prof. David S. Evans and Prof. Richard Schmalensee

Robert Mark Langer Counsel of Record	Wiggin and Dana LLP 20 Church Street Hartford, CT 06103 rlanger@wiggin.com	860-297-3724

Party name: J. Gregory Sidak and Robert D. Willig

Kenneth Eng-Kong Lee Counsel of Record	Levine Lee LLP 650 5th Avenue, 13th Floor New York, NY 10019 klee@levinelee.com	212-223-4400

Party name: The Australian Taxpayers' Alliance

Thomas Ryan McCarthy Counsel of Record	Consovoy McCarthy Park, PLLC 3033 Wilson Boulevard Suite 700 Arlington, VA 22201 tom@consovoymccarthy.com	7032439423

Party name: VERIZON COMMUNICATIONS INC.

Elizabeth Petrela Papez Counsel of Record	Winston & Strawn LLP 1700 K Street N.W. Washington, DC 20006 epapez@winston.com	202-282-5000

Party name: Discover Financial Services

Sharon Kunjumon Robertson
Counsel of Record

Cohen Milstein Sellers & Toll PLLC
88 Pine Street, 14th Floor
New York, NY 10005

srobertson@cohenmilstein.com

2128387797

Party name: United States Public Interest Research Group Education Fund, Inc.; Center for Responsible Lending; Consumer Federation of America; Consumers Union; National Association of Consumer Advocates; National Consumer Law Center; Public Citizen, Inc.

George D. Ruttinger
Counsel of Record

Crowell & Moring LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004

gruttinger@crowell.com

202-624-2670

Party name: 20 Merchants as Amici Curiae in Support of Petitioners

Paul Ethan Slater
Counsel of Record

Sperling & Slater, P.C.
Suite 3200
55 West Monroe Street
Chicago, IL 60603-0000

pes@sperling-law.com

312-641-3200

Party name: Ahold U.S.A., Inc.; Albertsons LLC; The Great Atlantic and Pacific Tea Company, Inc.; H.E. Butt Grocery Co.; Meijer, Inc.; Publix Super Markets, Inc.; Raley's; Rite Aid Corporation; Safeway, Inc.; Supervalu, Inc.; and Walgreen Co.

Mark Thomas Stancil
Counsel of Record

Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street N.W.
Washington, DC 20006

mstancil@robbinsrussell.com

202-775-4520

Party name: Wal-Mart Stores, Inc., The Home Depot, Inc., Target Corporation, Sears Holding Management Corporation, Jo-Ann Stores, LLC, and Merchant Trade Associations

Aaron Michael Streett
Counsel of Record

Baker Botts, L.L.P.
910 Louisiana Street
Houston, TX 77002

aaron.streett@bakerbotts.com

713-229-1855

Party name: Pharmaceutical Research and Manufacturers of America

Richard S. Taffet
Counsel of Record

Morgan Lewis & Bockius LLP
101 Park Avenue
New York, NY 10022

richard.taffet@morganlewis.com

(212) 309-6000

Party name: The Clearing House Association L.L.C.

Barbara Dale Underwood
Counsel of Record

Solicitor General
Office of the Attorney General
120 Broadway
New York, NY 10271-0332

212-416-8016

Barbara.underwood@ag.ny.gov

Party name: New York, Alaska, California, Delaware, Hawai'i, Indiana, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, New Mexico, North Carolina, Oregon, Pennsylvania, South Carolina, Washington, Wisconsin, and the District of Columbia

James A. Wilson Counsel of Record	Vorys, Sater, Seymour & Pease LLP 52 East Gay Street P. O. Box 1008 Columbus, OH 43216 jawilson@vorys.com	614-464-5606

Party name: The Merchant Advisory Group

Richard Alan Arnold	Kenny Nachwalter, P.A. 1441 Brickell Avenue, Suite 1100 Miami, FL 33131 rarnold@knpa.com	(305) 373-1000

Party name: Ahold U.S.A., Inc., et al.

Anthony J. Bolognese	Bolognese & Associates, LLC 1500 JFK Boulevard, Suite 320 Philadelphia, PA 19102 abolognese@bolognese-law.com	(215) 814-6750

Party name: John M. Connor, et al.

Eric F. Citron	Goldstein & Russell, P.C. 7475 Wisconsin Ave., Suite 850 Bethesda, MD 20814 ec@goldsteinrussell.com	(202) 362-0636

Party name: 25 Professors of Antitrust law

Debra L. Greenberger	Emery Celli Brinckerhoff & Abady, LLP 600 Fifth Avenue, 10th Floor New York, NY 10020 dgreenberger@ecbalaw.com	(212)-763-5000

Party name: Retail Litigation Center, Inc.

Deepak Gupta	Gupta Wessler PLLC 1900 L Street, NW Suite 312 Washington, DC 20036 deepak@guptawessler.com	(202) 888-1741

Party name: Former Federal Antitrust Officials

Andrew C. Nichols	Winston & Strawn LLP 1700 K Street NW Washington, DC 20006 anichols@winston.com	2022825000

Party name: Discover Financial Services

Elizabeth Petrela Papez	Winston & Strawn, LLP 1700 K Street, N.W. Washington, DC 20006 epapez@winston.com	(202) 282-5000

Party name: Discover Financial Services

Russell S. Post	Beck, Redden, L.L.P. 1221 McKinney St., Ste. 4500 Houston, TX 77010 rpost@beckredden.com	(713) 951-3700

Party name: Southwest Airlines Co.

Sharon K. Robertson	Cohen Milstein Sellers & Toll PLLC 88 Pine Street, 14th Floor New York, NY 10005 srobertson@cohenmilstein.com	212 838 7797

Party name: United States Public Interest Research Group Education Fund, Inc.

RECORD AND BRIEFS

16-1454

Supreme Court, U.S.
FILED
JUN - 2 2017
OFFICE OF THE CLERK

No. 16-___

In the Supreme Court of the United States

STATES OF OHIO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MONTANA, RHODE ISLAND, UTAH, AND VERMONT,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, AND AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
MICHAEL HENDERSHOT
Chief Deputy Solicitor
HANNAH C. WILSON
M. RYAN HARMANIS
Deputy Solicitors
BRIAN F. JORDAN
Assistant Attorney General
30 E. Broad St., 17th Floor
Columbus, OH 43215
614-466-8980
eric.murphy@ohioattorneygeneral.gov

Counsel for Petitioner
State of Ohio

QUESTION PRESENTED

This case asks how Section 1 of the Sherman Act, which bans unreasonable restraints of trade, applies to "two-sided" platforms that unite distinct customer groups. Such platforms are ubiquitous, ranging from eBay (serving buyers and sellers), to newspapers (serving readers and advertisers). Here, credit-card networks bring *cardholder* customers together with *merchant* customers for ordinary transactions. When doing so, Respondents American Express Company and American Express Travel Related Services Company ("Amex") contractually bar *merchant* customers from steering *cardholder* customers to credit cards that charge merchants lower prices. Applying the "rule of reason," the district court held that: (1) the Government proved that Amex's anti-steering provisions were anticompetitive because they stifled competition among credit-card companies for the prices charged to merchants, and (2) Amex failed to establish any procompetitive benefits. The Second Circuit reversed. It held that, to prove that the anti-steering provisions were anticompetitive (and so to transfer the burden of establishing procompetitive benefits to Amex), the Government bore the burden to show *not just* that the provisions had anticompetitive pricing effects on the merchant side, *but also* that those anticompetitive effects outweighed any benefits on the cardholder side. The question presented is:

Under the "rule of reason," did the Government's showing that Amex's anti-steering provisions stifled price competition on the merchant side of the credit-card platform suffice to prove anticompetitive effects and thereby shift to Amex the burden of establishing any procompetitive benefits from the provisions?

LIST OF PARTIES

The Petitioners in this Court and the Appellees in the Second Circuit are the States of Ohio, Connecticut, Idaho, Illinois, Iowa, Maryland, Michigan, Montana, Rhode Island, Utah, and Vermont.

The Appellees in the Second Circuit (and the Respondents in this Court) also included the United States, and the States of Arizona, Missouri, Nebraska, New Hampshire, Tennessee, and Texas.

The Respondents in this Court and the Appellants in the Second Circuit are American Express Company and American Express Travel Related Services Company, Inc.

In the district court, the State of Hawaii was also originally a plaintiff, and MasterCard International Inc., and Visa Inc. were also originally defendants.

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OPINIONS BELOW

The Second Circuit's unpublished en banc denial is reproduced at Pet. App. 324a. The Second Circuit's opinion, *United States v. American Express Co.*, 838 F.3d 179 (2d Cir. 2016), is reproduced at Pet. App. 1a. The district court's decision, *United States v. American Express Co.*, 88 F. Supp. 3d 143 (E.D.N.Y. 2015), is reproduced at Pet. App. 63a.

JURISDICTIONAL STATEMENT

The Second Circuit entered its judgment on September 26, 2016. It denied en banc review on January 5, 2017. Justice Ginsburg granted the States two extensions of time to file a petition for a writ of certiorari up to and including June 2, 2017. This petition timely invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

STATEMENT

A. Consumers Use Credit Cards For Trillions Of Dollars In Transactions Annually

Credit cards "have become a principal means by which consumers . . . purchase goods and services from the nation's millions of merchants." Pet. App. 73a-74a. The four dominant credit-card networks—Visa, MasterCard, Discover, and Respondents American Express Company and American Express Travel Related Services Company, Inc. ("Amex")—processed

about $2.399 trillion in spending in 2013. Pet. App. 74a.

When a consumer uses a credit card at a merchant's business, "a multitude of economic acts and actors" kick into gear. Pet. App. 5a. The consumer accesses credit extended by the particular card issuer. *Id.* The merchant "receives payment quickly—minus a fee" charged for the transaction. *Id.* By uniting cardholders and merchants in this way, credit-card companies operate what is known in economics terms as a "multi-sided" or "two-sided" platform. Pet. App. 7a-10a, 77a-79a. "In a two-sided platform, a single firm or collection of firms sells different products or services to two separate yet interrelated groups of customers who, in turn, rely on the platform to intermediate some type of interaction between them." Pet. App. 77a.

"[I]n order to succeed," a company operating a two-sided platform often "must 'find an effective method for balancing the prices on the two sides of the market.'" Pet. App. 9a (citation omitted). For credit-card platforms, cardholder demand for card use is more elastic than merchant demand for card acceptance, so "a network may charge its cardholders a lower fee than it charges merchants." *Id.* Amex cardholders, for example, "effectively pay a 'negative' price for acceptance services . . . in the form of rewards earned on a per transaction basis." Pet. App. 182a n.36. Such "rewards" can include items like cash back, airline miles, or gift cards. Pet. App. 14a, 89a. Merchants, by contrast, must pay "merchant discount fees" on a per-transaction basis to be able to accept cards from a particular credit-card network. Pet. App. 13a. The fees that merchants face to ac-

cept credit cards are "among many merchants' highest" costs. Pet. App. 221a; *cf. Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1148 (2017).

The total credit-card industry is both "highly concentrated" and "remarkably static." Pet. App. 154a. Four networks account for nearly all of the credit-card transactions that occur in the United States: Visa (45% market share, as of 2013), Amex (26.4%), MasterCard (23.3%), and Discover (5.3%). Pet. App. 13a. The most recent market entrant, Discover, arrived in 1985. Pet. App. 154a.

These credit-card companies administer structurally distinct networks. Visa and MasterCard operate "open-loop" networks. Pet. App. 13a; Pet. App. 55a-56a. In an open-loop network, distinct actors known as "issuers" (primarily banks) issue cards and credit, while other actors known as "acquirers" cover cardholder obligations by paying merchants under reimbursement contracts with the issuers. Pet. App. 13a. The price charged to the merchant in this system is "determined in large part by the interchange fee, which is paid by the acquirer to the issuer as the price for handling its transactions with the cardholder." Pet. App. 13a-14a.

Amex primarily operates a "closed-loop" network. It "acts not only as the middleman network but also as both the issuer and acquirer for the vast majority of transactions involving its cards." Pet. App. 14a-15a; Pet. App. 56a-57a. Without the umbrella network, Amex typically (but not always) has a direct relationship with both cardholders and merchants. Pet. App. 15a. It directly sets both the fees that merchants pay and the benefits that cardholders receive.

Id. Amex charges relatively higher merchant discount fees (and generates relatively more revenue from those fees) than the other credit-card networks. Pet. App. 16a, 19a, 87a-89a.

B. Amex's Standard Merchant Agreements Bar Merchants From Steering Their Retail Customers Toward Lower-Cost Cards

"Throughout the 1960s and 1970s, Visa, MasterCard, and Amex competed fiercely with one another for consumers on both sides of their platforms." Pet. App. 18a. In the 1980s, Visa and MasterCard began running advertising campaigns (such as "It's Everywhere You Want To Be") that questioned "the utility and value of Amex's card products" by targeting Amex's smaller acceptance network and higher merchant fees. Pet. App. 18a-19a. These campaigns encouraged cardholders and merchants to steer transactions toward cheaper cards. Pet. App. 19a, 92a. Facing a loss in market share from these campaigns and other exclusionary conduct, Amex responded by "strengthening contractual restraints designed to control how merchants treat Amex cardholders at the point of sale." Pet. App. 19a. These restraints worked to "ensure that merchants could not state a preference for any payment-card network other than Amex" once the merchants decided to accept Amex's network. *Id.*

The results of these efforts are found in Amex's present-day merchant agreements. Under Amex's standard anti-steering provisions, a merchant that decides to accept Amex cards may not, among other things, "indicate or imply" a preference for a non-Amex form of payment; "dissuade" a customer from

using an Amex card; "persuade or prompt . . . any other method of payment"; "impose any restrictions, conditions, disadvantages or fees" on an Amex card "that are not imposed equally on" other payment products, "except for electronic funds transfer, or cash and check"; or "promote" other forms of payment, other than a merchant's private-label card, "more actively than [it] promote[s]" Amex. Pet. App. 19a-20a.

Amex "actively monitors" and "vigorously enforces" these anti-steering provisions. Pet. App. 102a-104a. "In practice," therefore, the provisions "operate to block Amex-accepting merchants from encouraging their customers to use any credit or charge card other than an American Express card, even where that card is less expensive for the merchant to accept." Pet. App. 100a. Although Visa and MasterCard previously maintained their own anti-steering provisions, Pet. App. 206a n.43, Amex's provisions apply even when a merchant does not reference Amex at all—such as if a merchant encourages use of a competing card. Pet. App. 101a-102a. This "result[s] in the restraints' effects being inflicted across the . . . industry." Pet. App. 102a.

C. The District Court Held That Amex's Anti-Steering Provisions Restrained Trade Under Section 1

The United States and seventeen States (collectively, "the Government") filed suit against Visa, MasterCard, and Amex, alleging that each company's anti-steering provisions (with limited exceptions) violated Section 1 of the Sherman Act, 15 U.S.C. § 1, because they stifled competition in the prices charged

to merchants. Pet. App. 21a-22a. Visa and MasterCard voluntarily rescinded their anti-steering provisions. Pet. App. 22a. Amex proceeded to trial. *Id.*

After a seven-week bench trial, the district court held that Amex's anti-steering provisions violated Section 1 by "creat[ing] an environment in which there is nothing to offset credit card networks' incentives . . . to charge merchants inflated prices for their services. This, in turn, results in higher costs to all consumers who purchase goods and services from these merchants." Pet. App. 68a. The district court determined that the anti-steering provisions are vertical restraints analyzed under the rule of reason. Pet. App. 105a-106a. Three aspects of its ruling are particularly relevant: (1) its definition of the relevant market; (2) its finding of anticompetitive effects; and (3) its rejection of procompetitive benefits.

1. *Relevant Market.* To determine whether the anti-steering provisions have anticompetitive effects, the court defined the relevant market as "the market for general purpose credit and charge card network services" provided to *merchants*. Pet. App. 112a. Those "services include the core enabling functions provided by networks, which allow merchants to capture, authorize, and settle transactions for customers who elect to pay with their credit or charge card." Pet. App. 113a. The court thus rejected Amex's argument that, for antitrust purposes, the relevant market should include both the credit-card companies' market for *merchant* customers and their market for *cardholder* customers. Pet. App. 116a-118a.

2. *Anticompetitive Effects.* The district court held that the Government met its burden to show that the

anti-steering provisions "adversely affected competition in the" relevant market. Pet. App. 148a. It relied on two grounds: (1) that Amex had market power, and (2) that the provisions have had actual anti-competitive effects in the merchant-services market.

First, the court held that Amex possesses "significant market share in a highly concentrated market with high barriers to entry, and [is] able to exercise uncommon leverage over [its] merchant-consumers due to the amplifying effect of cardholder insistence and derived demand." Pet. App. 150a. Amex accounts for 26.4% of a market with only four key players. Pet. App. 151a. The court also found that the market contained significant barriers to entry, including "sizable setup costs" as well as a "'chicken and the egg problem'" in which potential entrants "would struggle to convince merchants to join a network without a significant population of cardholders and, in turn, would also struggle to convince cardholders to carry a card associated with a network that is accepted at few merchants." Pet. App. 154a. And "critical to the court's finding of market power" was Amex's "highly insistent or loyal cardholder base." Pet. App. 156a. Finally, the court found "direct evidence" of market power in Amex's historical pricing practices. Pet. App. 165a.

Second, the district court held that Amex's anti-steering provisions had caused actual harm to competition in the market for merchant services. Pet. App. 191a-228a. Given the multi-sided nature of the platform, the court found that the anti-steering provisions "frustrated" price competition among credit-card companies for merchants "to the point of near irrelevance." Pet. App. 195a. The provisions pre-

vented *merchants* from reacting to price increases by steering cardholders to lower-cost cards, and cardholders had no incentive to react to those price increases on their own because the increases were imposed on the merchants (and were essentially unseen to cardholders). *Id.* Without steering, therefore, "the record demonstrate[d] that . . . there is virtually no check on the networks' incentive or ability to charge higher prices to merchants, so long as the network's pricing is below the level at which a rational merchant would drop acceptance entirely." Pet. App. 197a.

The court next found that these anti-steering provisions "render it nearly impossible for a firm to enter the relevant market by offering merchants a low-cost alternative to the existing networks." Pet. App. 203a. As evidence, it cited Discover's failed effort to switch to a low-cost business model in the 1990s. Pet. App. 203a-207a. That model sought to gain market share by lowering merchant fees. *Id.* Discover's project failed because the anti-steering provisions "denied merchants the ability to . . . steer share to Discover's lower-priced network." Pet. App. 205a.

The court also determined that Amex's anti-steering provisions had generated higher prices for merchants and consumers. Pet. App. 207a-212a. The provisions enabled Amex *and* its competitors to charge higher merchant fees "without fear of other networks undercutting their prices." *See* Pet. App. 210a. Merchants on the receiving end of these price increases would, in turn, "pass most, if not all, of their additional costs along to their customers in the form of higher retail prices." Pet. App. 210a-211a. While Amex cardholders may reap rewards that off-

set some of these costs, the same could not be said for those who pay in cash or with cheaper cards. Those other consumers subsidize "the cost of the premium rewards conferred by [Amex] on its relatively small, affluent cardholder base in the form of higher retail prices." Pet. App. 211a-212a. "The court view[ed] this externality as another anticompetitive effect" of Amex's anti-steering provisions. Pet. App. 212a.

3. *Procompetitive Benefits.* After concluding that the Government had met its burden of proving anti-competitive effects, the district court next considered whether the anti-steering provisions were justified by the procompetitive benefits proffered by Amex. Pet. App. 228a-258a. Amex argued that the provisions were necessary: (1) to preserve its business model and thus its ability to compete in the credit-card market; and (2) to prevent merchants from free-riding on the Amex brand. Pet. App. 229a.

The district court held that neither justification satisfied Amex's burden. It rejected arguments that the anti-steering provisions promote competition by "safeguard[ing]" Amex's business model. Pet. App. 230a. The court found this argument—i.e., that "Amex's current business model could not survive if exposed to the full spectrum of interbrand competition"—fundamentally inconsistent with the Sherman Act's goal of promoting competition. Pet. App. 235a. The court also held that Amex's free-riding arguments, to the extent they had evidentiary support, were insufficient to "offset the significantly more pervasive harms done to interbrand competition by the same restraints." Pet. App. 251a-252a.

After the district court found a violation, it largely adopted the Government's proposed remedy and entered a permanent injunction. Pet. App. 260a (remedial opinion), 294a (injunction).

D. The Second Circuit Reversed

The Second Circuit reversed the district court's injunction. It held that "[t]he District Court's definition of the relevant market . . . is fatal to its conclusion that Amex violated § 1." Pet. App. 31a. Whereas the district court had defined the market to include only "network services" provided to *merchants*, the circuit court held that the relevant market must also include the market for credit provided to *cardholders*. Pet. App. 32a. "Separating the two markets," the Second Circuit held, "allows legitimate competitive activities in the market for general purposes to be penalized no matter how output-expanding such activities may be." Pet. App. 35a. For two-sided markets, the court reasoned, the antitrust law "must consider the feedback effects inherent on the platform by accounting for the reduction in cardholders' demand for cards (or card transactions) that would accompany any degree of merchant attrition" from higher prices. Pet. App. 39a.

The Second Circuit next held that the district court's market-power conclusion was error. Pet. App. 40a-48a. The district court focused on Amex's ability to increase prices to merchants, but, in the Second Circuit's view, "merchant pricing is only one half of the pertinent equation." Pet. App. 44a. A proper analysis would focus additionally on the effects in the cardholder market. Pet. App. 44a. The Second Circuit also concluded that the district court's finding of

market power was marred by its reliance on "cardholder insistence." Pet. App 45a-48a. It reasoned that that phenomenon was indicative of "cardholder satisfaction," Pet. App. 48a, which is what "makes it worthwhile for merchants to pay the relatively high fees that Amex charges," Pet. App. 45a-46a.

Finally, the Second Circuit ruled that the district court's findings on anticompetitive effects were erroneous, again because its analysis did not account for cardholder benefits. Pet. App. 49a-53a. In its view, the Government's burden was to show that both merchants *and* cardholders were "worse off overall." Pet. App. 51a. It likewise dismissed the finding that higher retail prices for all consumers were an anticompetitive harm because the district court had not accounted for the rewards enjoyed by *Amex cardholders*. Pet. App. 49a n.52. Without "'a reliable measure of American Express's two-sided price,'" the Second Circuit held, "the District Court could not have properly concluded that a reduction in the merchant-discount fee would benefit the two-sided platform overall." Pet. App. 53a (citation omitted).

Because the Government had not proved "net harm to . . . both cardholders and merchants," the Second Circuit reversed. Pet. App. 54a. It directed the district court to enter a judgment for Amex. *Id.*

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT REVIEW BECAUSE OF THE INCREASING NEED FOR GUIDANCE ON THE RULE OF REASON AND BECAUSE THE DECISION BELOW CONFLICTS WITH ITS CASES

The Court should grant review initially because this case provides a good opportunity for the Court to clarify how the rule of reason should operate in practice. And it should grant review because the Second Circuit's reasoning conflicts with the guidance that the Court has provided.

A. The Court Has Not Had A Recent Opportunity To Provide Concrete Guidance Over The Rule Of Reason's Structure

1. Section 1 prevents any "contract" "in restraint of trade." 15 U.S.C. § 1. Since all contracts restrain what the parties may accomplish, the Court has always read this language to bar only *unreasonable* restraints. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007). To be "unreasonable," moreover, a particular restraint must have anticompetitive effects that "outweigh" any procompetitive justifications. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990). The Court has established various "methods" to answer that ultimate balancing question. *Id.*

The Court treats a few restraints—most notably, an agreement among competitors to raise prices or restrict output—as illegal *per se*. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988). These restraints are "'always or almost always'" anticompetitive, in that they "'tend to restrict competition

and decrease output.'" *Id.* (citation omitted). By "eliminat[ing] the need to study the reasonableness of an individual restraint in light of the real market forces at work," this *per se* rule also "give[s] clear guidance for certain conduct" to the business community and governmental regulators alike. *Leegin*, 551 U.S. at 886.

The Court subjects most other restraints to the "rule of reason." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). This rule applies on a restraint-by-restraint basis to distinguish those that "may suppress or even destroy competition" from those that "merely regulate[] and perhaps thereby promote[] competition." *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918). "In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Leegin*, 551 U.S. at 886.

Within this general rule of reason, moreover, the Court has adopted an "abbreviated or 'quick-look' analysis" that applies if "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999); *e.g.*, *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) (*NCAA*); *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986). This quick-look analysis reduces the burdens imposed on governments to show anticompetitive harms before shifting to the defendant the burden of establishing procompetitive benefits. *See Cal. Dental Ass'n*, 526 U.S. at 770; *cf. Chi. Prof'l Sports Ltd.*

P'ship v. Nat'l Basketball Ass'n, 961 F.2d 667, 674 (7th Cir. 1992) (Easterbrook, J.).

2. The Court should grant review because this case provides an important opportunity to clarify how the lower courts should structure the rule of reason in practice. For several reasons, that guidance would serve a needed function.

To begin with, most of this Court's recent cases interpreting Section 1 have asked a different question: whether a restraint falls within the *per se* rule of illegality, the quick-look doctrine, or the full rule of reason. Most recently, for example, the Court held that the rule of reason applies to "reverse payment settlements" in which a patent holder settles with an alleged infringer on terms that require the patent holder to pay the alleged infringer *not* to produce the purportedly patented product. *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2237-38 (2013). Similarly, in *Leegin*, the Court held that the rule of reason, not the *per se* rule, applies to a manufacturer's decision to impose resale price maintenance on its distributors. 551 U.S. at 882. And, in *California Dental Association*, the Court held that the rule of reason, not the quick-look doctrine, applies to advertising restrictions imposed on California dentists by a nonprofit professional association. 526 U.S. at 780-81; *see also, e.g.*, *Texaco Inc. v. Dagher*, 547 U.S. 1, 8 (2006). As these cases prove, this Court has recently shown a clear preference for the rule of reason, and thereby increased the rule's importance.

At the same time, none of the Court's recent cases has explained how the rule of reason should *operate in practice* once the Court decides that the rule ap-

plies. The Court has offered only generalities: The "essential inquiry," the Court has said, asks "whether or not the challenged restraint enhances competition." *NCAA*, 468 U.S. at 104. To resolve that inquiry, the Court has added, "the factfinder weighs all of the circumstances of a case." *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). The rule thus takes "into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *Khan*, 522 U.S. at 10. Yet the Court has also cautioned that the rule of reason does not always require a "plenary market examination," and that the amount of scrutiny depends on the particular restraint at issue. *Cal. Dental Ass'n*, 526 U.S. at 779 (noting that "our categories of analysis of anticompetitive effect are less fixed than terms like '*per se*,' 'quick look,' and 'rule of reason' tend to make them appear").

Aside from these generalities, the Court has provided almost no specifics to assist in deciding concrete cases, "leaving lower courts with no clear standards." Jesse Markham, Jr., *Sailing a Sea of Doubt: A Critique of the Rule of Reason in U.S. Antitrust Law*, 17 Fordham J. Corp. & Fin. L. 591, 594 (2012). For the government to prove anticompetitive effects, for example, "how much needs to be shown and how much can be assumed" from basic economic principles? 7 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* 403 (3d ed. 2010). Conversely, what must a defendant prove to establish countervailing benefits? How should a court balance the two? *Cf.* Herbert Hovenkamp, *Antitrust Balancing*, 12 NYU

J.L. & Bus. 369, 371-72 (2016) (noting that many lower courts "balance" pro- and anticompetitive effects, but that this Court has "never actually conducted any balancing"). This Court has "not produced many rulings that offer practical instruction" on these questions. Theodore Voorhees, Jr., *Reasoning Through the Rule of Reason for RPM*, 28 Antitrust 58, 62 (2013). This lack of guidance over the rule-of-reason framework engenders uncertainty for all sides, making a rule-of-reason case "one of the most costly procedures in antitrust practice." Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 105 (2005). Further, "the result of the process in any given case may provide little certainty or guidance about the legality of a practice in another context." *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 343 (1982). This case presents a good vehicle for the Court to provide greater clarity over the rule of reason.

Notably, members of this Court have themselves recognized the need for such clarity. One recent case highlighted how the rule of reason's "'elaborate inquiry'" "produces notoriously high litigation costs and unpredictable results." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015) (citation omitted). The rule has also been characterized as "amorphous." *Actavis*, 133 S. Ct. at 2238 (Roberts, C.J., dissenting). And it has been said to be prone to "mistakes" that can impose "serious costs." *Leegin*, 551 U.S. at 917 (Breyer, J., dissenting). This lack of clarity is especially problematic in the antitrust context, as the Court has "emphasized the importance of clear rules in antitrust law." *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 452 (2009). Yet this

Court has admittedly left the primary rule governing most restraints anything but clear.

This case proves the problems posed by uncertainty. Before the decision below, the Second Circuit had recognized that the credit-card industry contains more than one market for antitrust purposes, including a market for cards with cardholders as the customers and a market for networks with merchants and card issuers as the customers. *See United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 239-40 (2d Cir. 2003). This view guided a discovery period in this case that extended many years and a trial that extended "over a seven-week period . . . and featured over thirty fact witnesses and four expert witnesses." Pet. App. 69a. Only after this costly litigation did the Government learn from the Second Circuit that it had allegedly focused on the wrong "market." Pet. App. 31a-40a. To reach that result, moreover, the Second Circuit had to make subtle legal distinctions between this case and *Visa*. Pet. App. 33a-36a. And rather than remand for further proceedings under the revised market definition, the court directed a verdict for Amex based on the Government's alleged failure of proof. Pet. App. 54a. This case confirms that "nowhere" is the combination of "vague rules" and "high stakes" "more deadly than in antitrust litigation under the rule of reason." Frank Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135, 155 (1984). Years of litigation that were financed through taxpayer dollars were wasted by the rule of reason's uncertainties.

B. The Second Circuit's Holding Conflicts With General Guidance That The Court Has Provided Under The Antitrust Laws

The Court should also grant review because the Second Circuit's legal reasoning conflicts with general antitrust guidance that this Court has provided. The Second Circuit did not dispute two of the district court's key *factual* findings. One: Amex's anti-steering provisions have had the actual market effect of raising the prices that the credit-card industry charges *merchants*. Pet. App. 207a. Two: This price increase has had the corresponding effect of raising the prices that those merchants charge the ultimate consumers for the merchants' goods and services. Pet. App. 210a-211a. Instead, the Second Circuit held that the district court erred *as a matter of law* by ruling that these price increases on merchants and consumers sufficed to show anticompetitive effects under the rule of reason. Pet. App. 49a-50a & n.52. According to the Second Circuit, the Government had to show—additionally—that these price increases were not countered by "offsetting benefits to cardholders in the form of rewards and other services." Pet. App. 49a n.52. And because there was no "reliable evidence" accounting for the pricing effects on *both* sides of the credit-card platform, the Second Circuit held that the Government failed to carry its burden of proof. Pet. App. 54a.

The Second Circuit's legal analysis conflicts with this Court's guidance in at least two respects: (1) its broad market definition for assessing anticompetitive harm conflicts with the manner in which this Court has defined the relevant market; and (2) its mandate that the Government affirmatively *dis*prove any al-

legedly offsetting procompetitive cardholder benefits conflicts with the Court's cases indicating that an antitrust defendant bears the burden of establishing procompetitive justifications for restraints of trade.

1. *Market Definition.* Because of the two-sided nature of the credit-card industry (with both cardholder and merchant customers), the Second Circuit held that the Government bore the burden to prove that anticompetitive harm on merchants (in the form of higher prices on merchants and their ultimate consumers) was not offset by allegedly procompetitive benefits on cardholders (in the form of rewards and services). Pet. App. 51a. In other words, the Second Circuit charged the Government to prove the "net effect," accounting for both sides of the credit-card platform in its initial proof of an anticompetitive effect. This analysis conflicts with this Court's *general* test to identify the "relevant market," and with the Court's *specific* application of that test to multi-sided platforms like credit-card networks.

As a *general* matter, the Second Circuit's approach departs from the test that the Court has long used to identify the applicable market for antitrust purposes. To decide that question, the Court asks whether a product or service is "reasonably interchangeable" with the product or service that is at issue in the specific antitrust case. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (applying this test for monopolization claims under Section 2); *Int'l Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242, 250-51 (1959) (applying this test under Sections 1 and 2).

The credit-card industry's services to *cardholders* cannot meet this test because they are not "reasonably interchangeable" with the industry's distinct services to *merchants*. *Grinnell*, 384 U.S. at 571. If the credit-card industry raised prices on merchants (as the district court found, Pet. App. 207a), those merchants could not simply switch from the merchant services that they purchase to the cardholder services that cardholder customers purchase. While interrelated, the services offered to customers on one side of the platform are fundamentally different "products" from those offered on the other side. And simply because the same company, by virtue of its business model, provides different services to different customers does not mean that those services are somehow in the same relevant market.

Rather than apply the established market-definition test, the Second Circuit adopted a new one. Because the price in the market for merchant services *affects* the price in the market for cardholder services, the Second Circuit held that the cardholder and merchant markets should be consolidated into a single market for antitrust purposes. Pet. App. 39a-40a. It is often the case that pricing in one market affects pricing in another, but that interdependency has never collapsed the two markets into one for antitrust purposes. Take *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). That case considered the market for Kodak *replacement parts and services* for photocopiers. *Id.* at 456. The Court held that the market for replacement parts could be considered a distinct market, *id.* at 481-82, even though the price of replacement parts would have some pricing effects on the market for Kodak

photocopiers, *cf. id.* at 495 (Scalia, J., dissenting). Similarly, pricing in the market for components often affects pricing in the market for final goods. This case proves the point in that the higher costs from credit-card transactions incurred by merchants pass on to consumers in the form of higher retail prices. Pet. App. 210a-211a. But this Court has never said that all of these distinct markets should be treated as a single one for that reason. *Cf. Illinois Brick Co. v. Illinois*, 431 U.S. 720, 741-42 (1977).

As a *specific* matter, the Second Circuit's decision departs from this Court's cases regarding two-sided platforms. Those platforms are nothing new. Newspapers, which bring together readers and advertisers, predate the Sherman Act. Notably, the Court has treated the readership market as separate from the advertising market under the antitrust laws. *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 610 (1953). In *Times-Picayune*, a corporation required advertisers seeking to advertise in its "Times-Picayune" newspaper (the only morning paper in New Orleans) to advertise additionally in its "States" newspaper (an evening paper competing with another evening paper, the "Item"). *Id.* at 597-600. The United States asserted that the corporation had adopted an unlawful tying scheme by requiring those who wanted to advertise in the dominant Times-Picayune to advertise in the evening States. The district court ruled for the United States. *Id.* at 600-01.

This Court disagreed. To do so, it recognized that a newspaper "is a dual trader in *separate* though interdependent markets." *Id.* at 610 (emphasis added). A newspaper "sells the paper's news and advertising

content to its *readers*," and then "that readership is in turn sold to the *buyers of advertising space*." *Id.* (emphases added). The case, however, "concern[ed] solely one of these markets." *Id.* The corporation did not require *readers* to purchase both the States and the Times-Picayune; it required only *advertisers* to do so. *Id.* The Court thus reversed initially because the Times-Picayune did not have a dominant position in the *advertising* market in New Orleans. *Id.* at 611-12. It then held that, while *readers* distinguished between the corporation's two papers, the *advertisers* would have viewed the papers as the same product—readership. *Id.* at 613. Thus, the Court ruled that the corporation had not tied distinct products together when assessed from the advertiser perspective; the products were identical to advertisers. *Id.* at 613-14; *see also Lorain Journal Co. v. United States*, 342 U.S. 143, 154 (1951) (upholding finding that a newspaper unlawfully monopolized advertising market without considering effects on readership prices); *Beryln Inc. v. Gazette Newspapers, Inc.*, 73 F. App'x 576, 582-83 (4th Cir. 2003) (distinguishing markets for readers and advertisers).

Even though *Times-Picayune* involved a two-sided platform and even though the Court held that each side of that platform was a "separate" market for antitrust purposes, 345 U.S. at 610, the Second Circuit did not cite, let alone distinguish, that case. Yet the decisions are irreconcilable. If the court thought that *Times-Picayune* was outdated based on emerging literature concerning two-sided platforms, it should have done what Judge Posner did with respect to maximum resale price maintenance: The court should have followed *Times-Picayune*'s market anal-

ysis despite its disagreement with the analysis because "it is this Court's prerogative alone to overrule one of its precedents." *Khan*, 522 U.S. at 19; *cf. Kimble*, 135 S. Ct. at 2406.

The Second Circuit's decision also conflicts with the way *NCAA* defined the relevant market for purposes of identifying anticompetitive effects. There, the Court considered whether the NCAA had unreasonably restrained trade by restricting the number of college football games that broadcasters aired on television. 468 U.S. at 91-96. It, too, implicated a multi-sided platform with television broadcasters joining advertisers, viewers, and content providers. The NCAA argued that, rather than examine only the higher prices on broadcasters (and advertisers) caused by its restraint, the Court should consider the other side of the platform—namely, how the NCAA's television restrictions affected *total viewership* of football games (both live and via television). *See* Br. for the Petitioner at 8-9, 11, *NCAA*, 468 U.S. 85 (No. 83-271). The Court did not do so when determining anticompetitive effects, finding that the plaintiff had met its burden to show those effects based on the higher broadcaster prices (and lower number of televised games) alone. *NCAA*, 468 U.S. at 105-06.

Indeed, the Second Circuit's view—that the district court should have considered the effects on all sides of the platform—adopted arguments here that were accepted only by the dissent in *NCAA*. The *NCAA* dissent criticized the district court because "[i]t made no explicit findings concerning the effect of the plan on *viewership* and thus did not reject the factual premise of the NCAA's argument that the plan might enhance competition by increasing the

market penetration of NCAA football." *Id.* at 133 (White, J., dissenting) (emphasis added). And the dissent criticized the majority's reliance on a rise in prices on broadcasters and advertisers because those rising prices "more properly should be attributed to an increase in output, measured in terms of viewership." *Id.* at 130; *cf.* 7 Areeda & Hovenkamp, *supra*, at 394-95 (discussing different views of "output" in *NCAA*); *Chi. Prof'l Sports*, 961 F.2d at 673-74 (same).

2. *Burden of Proof.* The Second Circuit's market definition led it astray in another way: It effectively shifted to the Government the burden of *disproving* any procompetitive benefits for the anti-steering provisions when identifying their anticompetitive effects. With the market defined to include cardholders, the Second Circuit held, the Government bore the initial burden to prove that any anticompetitive effects caused on the prices for merchants (and their consumers) were not offset by any alleged countervailing benefits to Amex cardholders. *E.g.*, Pet. App. 49a (noting that district court failed to consider the "two-sided net price"); Pet. App. 51a-52a (noting that the Government was required to show anticompetitive effects on the market as a whole, including Amex cardholders). This reasoning effectively collapsed the staggered rule-of-reason framework into a single, all-encompassing step.

That analysis, too, conflicts with the Court's cases. The Court has noted that a defendant—not the Government—bears the burden of establishing the procompetitive justifications for a restraint. "An antitrust defendant may show in the antitrust proceeding that legitimate justifications are present, thereby explaining the presence of the challenged term and

showing the lawfulness of that term under the rule of reason." *Actavis*, 133 S. Ct. at 2236; *see Cal. Dental Ass'n*, 526 U.S. at 788 (Breyer, J., concurring in part and dissenting in part) ("In the usual Sherman Act § 1 case, the defendant bears the burden of establishing a procompetitive justification."). This Court has also limited what can qualify as a "procompetitive" justification. Competition generally "cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

II. The Court Has Often Granted Review Where, As Here, The Question Presented Is Important To The National Economy

A. The Court has often granted certiorari when cases have raised issues that were important to the national economy. That makes sense. Here, for example, a circuit in New York should not have the final say over the prices of everyday retail transactions across the whole country.

NCAA provides a case in point. As noted, the Court granted review over whether the NCAA had unreasonably restricted the amount of college football games that television stations could air. 468 U.S. at 91-96. Notwithstanding the "uniqueness of this product," *id.* at 111, the issue affected the entire country—ranging from fans of the University of Oklahoma to potential advertisers for games played by the University of Georgia, *id.* at 88; *cf. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of*

Okla., 463 U.S. 1311, 1313 (1983) (White, J., in chambers) (noting that the decision below "would obviously have a major impact countrywide, and the case plainly presents important issues under the antitrust laws").

Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979), provides another example. That case addressed the antitrust implications of blanket licenses for copyrighted musical compositions that two organizations sold. *Id.* at 4-7. While this product was again a unique one, the blanket licenses contained the rights to "*[a]lmost every* domestic copyrighted composition." *Id.* at 5 (emphasis added). The Court thus granted review "because of the importance of the issues to the antitrust and copyright laws." *Id.* at 7.

Similar cases are not hard to find. *E.g.*, *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 663 (1975) (granting review to consider whether investors could challenge the system of fixed commissions imposed by the major stock markets); *Nat'l Broiler Marketing Ass'n v. United States*, 436 U.S. 816, 820 (1978) (granting review over antitrust-immunity question "[b]ecause of the importance of the issue for the agricultural community and for the administration of the antitrust laws"); *Sylvania*, 433 U.S. at 42 (granting review "to resolve [an] important question of antitrust law" for manufacturers and retailers).

B. This case fits that mold because it affects an astronomical number of retail transactions in the United States. The U.S. credit-card market is the world's second largest pool of unsecured consumer debt in the world (after student loans). Victor Stango

& Jonathan Zinman, *Borrowing High versus Borrowing Higher: Price Dispersion and Shopping Behavior in the U.S. Credit Card Market*, 29 The Review of Financial Studies 979, 980 (2016). In 2011, there were 22.2 billion transactions on credit cards with a total purchase volume of $2.05 trillion. Jack Soll, et al., *Consumer Misunderstanding of Credit Card Use, Payments, and Debt: Causes and Solutions*, 32 Journal of Public Policy and Marketing 65, 66 (2013). By 2013, the total purchase volume had grown to about $2.399 trillion. Pet. App. 74a. Thus, "[a]n inefficient or monopolized payment system . . . can distort consumer and merchant choices and make underlying markets in goods and services less efficient"—on a very large scale. Alan Frankel & Allan Shampine, *The Economic Effects of Interchange Fees*, 73 Antitrust L.J. 627, 627 (2006). Whether assessed from the perspective of consumers or from that of merchants, this case's importance cannot be overstated.

Consumers. The question affects all American consumers. "Credit cards have become a major factor in the economic life of American households." Sarah Jiang and Lucia Dunn, *New Evidence on Credit Card Borrowing and Repayment Patterns*, 51 Economic Inquiry 394, 394 (2013). By one estimate, "among all households with incomes over $30,000, 92 percent hold at least one card." Douglas Akers, et al., *Overview of Recent Developments in the Credit Card Industry*, FDIC Banking Review 23, 24 (2005). The average for all households is 6.3 credit cards. *Id.*

Even for consumers without credit cards, the question is important. Because (1) credit-card transactions cost more than cash transactions and (2) merchants often charge the same price for their

goods and services no matter the type of payment used, credit-card use leads to a "nontrivial transfer of income from cash to card payers, and consequently a transfer from low-income to high-income consumers." Scott Schuh et al., *Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations*, Fed. Res. Bank of Boston 1 (Pub. Pol'y Discussion Paper No. 10-03, Aug. 31, 2010), https://goo.gl/o6BYUH. Any consumer paying by cash, check, debit card, or other cash equivalent subsidizes a consumer paying by credit card. Pet. App. 210a-211a. One estimate finds that the lowest-income households transfer $21 out per year, and the highest-income households receive $750 each year. Schuh, *supra*, at 1. This subsidy arises from the fact that, overall, credit-card use "induces" a price markup of 0.82% for *all* prices for all goods, regardless of how a particular consumer pays for the particular good. *Id.* at 27.

These subsidies arise from many factors, including, as noted, merchant "reluctant[ance] to price differentially at the point of sale." Frankel & Shampine, *supra*, at 672. But "modern retail payment technology makes [differential pricing] easier than ever and there is no reason to impede one of the few ways merchants have to align their interests with those of their customers." *Id.* The anti-steering provisions bar that aligning.

Merchants. The question likewise affects millions of merchants. Today, credit cards are accepted at "nearly all retail establishments." Akers, *supra*, at 24. About 3.4 million merchants take Amex, which is accepted by far fewer merchants than Visa and MasterCard. Pet App. 184a. Collectively, merchants

paid more than $52 billion in credit-card transaction fees in a recent year. *Merchant Processing Fees in the U.S.*, Nilson Rep. 12 (HSN Consultants Inc., Carpinteria, Cal., May 2014). Total fees paid by merchants add up to more than the entire value of the U.S. music industry and more than all domestic Hollywood box office sales. Adam Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1323-24 (2008).

These fees are "the ultimate transaction cost." *Id.* at 1324. "[S]everal studies have concluded that credit cards currently cost merchants substantially more than" other payment methods. Frankel & Shampine, *supra*, at 672. These costs are "six times as much as cash," Levitin, *supra*, at 1322-23, and three times as much as debit-cards, *Merchant Processing Fees*, *supra*, at 12. Testimony in the trial showed, for example, that one airline paid twice in *credit-card* costs what it paid in *labor* costs. Pet. App. 221a-222a. Whether these pervasive fees are optimal is "the central issue in the economics of credit card networks." Dennis Carlton and Ralph Winter, *Competition Policy & Regulation in Credit Card Markets: Insights from Single-Sided Market Analysis* 4 (2014), https://goo.gl/n4ssN7. Merchants have already proved their deep interest in this case. Many of the best-known names in the country filed statements about the scope of relief in the district court. Pet. App. 1a-3a, 262a-263a.

In short, because the Court "selects its docketed cases on the basis of the general importance of the issues they present," *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 191 (1988) (Scalia, J., dissenting), the Court should grant review in this case. "Given the

pervasive significance of" credit cards to the national economy, the question here is "of undoubted importance." *Boggs v. Boggs*, 520 U.S. 833, 836 (1997); *see Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 58 (2003) (reviewing question with "broad impact . . . on the national economy").

III. The Sherman Act's Central Purpose—To Enhance Consumer Welfare Through Allocative Efficiency—Supports Review

A. Since the late 1970s, this Court has recognized that "Congress designed the Sherman Act as a 'consumer welfare prescription.'" *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting Robert Bork, *The Antitrust Paradox* 66 (1978)). "The purpose of antitrust law, at least as articulated in the modern cases, is to protect the competitive process as a means of promoting economic efficiency." *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1437 (7th Cir. 1986) (Posner, J.). At bottom, this efficiency focus directs courts to consider whether a particular restraint has "impair[ed] the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them." *Ind. Fed'n of Dentists*, 476 U.S. at 459.

Two well-known examples show this Court's modern efficiency focus. On the one hand, the Court has continued to identify "[r]estrictions on price and output" as "the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit." *NCAA*, 468 U.S. at 107-08; *Leegin*, 551 U.S. at 886. Those restrictions represent the "core case for antitrust regulation" because they generate an ineffi-

cient "externality." Douglas Ginsburg, *Rationalizing Antitrust*, 35 Antitrust Bull. 329, 331 (1990). *Private* cartels impose *societal* costs in the form of "a transfer of wealth from consumers to producers as well as a deadweight loss to society" from the lost transactions that do not occur as a result of the higher prices. *Id.*; *see* Bork, *supra*, at 66-67, 98-101.

On the other hand, the Court has gradually changed its position toward vertical restraints that a manufacturer imposes on its retailers or distributors—moving away from *per se* rules and toward the rule of reason for those restraints. *Leegin*, 551 U.S. at 901-02 (describing history). The Court has done so because of the efficiency-enhancing potential that the restraints have. While they reduce *intrabrand* competition (competition among retailers selling the same brand of a product), they may ultimately enhance *interbrand* competition (competition among different brands of the same product). *Id.* at 890.

A manufacturer, for example, may impose resale price maintenance—barring its retailers from pricing its product below a certain price—to fix a "free rider" problem. *Chi. Prof'l Sports*, 961 F.2d at 674 ("Control of free-riding is . . . an accepted justification for cooperation."). Retailers who furnish services with respect to the manufacturer's product may generate greater demand for that product (but have to price the product at a higher amount that accounts for the costs of those services). If "discounting retailers" who do not furnish the services could undercut the service providers, it could lead to an elimination of the services that consumers would otherwise demand. *Leegin*, 551 U.S. at 890-91; *cf. Rothery Stor-*

age & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 212-13 (D.C. Cir. 1986) (Bork, J.).

B. These efficiency concerns further justify the Court's review in this case. At bottom, Amex's anti-steering provisions distort allocative efficiency because they impose costs on one side of the platform (the merchants) that are not *internalized* by those making the ultimate decision about how to pay for the transaction on the other side (the cardholders). Because the Government's case seeks to correct this "externality" problem, it, too, falls within "the core case of antitrust regulation." *See* Ginsburg, *supra*, 35 Antitrust Bull. at 331; Pet. App. 212a. This point is confirmed by comparing the clear anticompetitive effects on one side of the platform with the murky procompetitive justifications on the other.

1. *Anticompetitive Effects On Merchant Side.* The Second Circuit nowhere disputed the district court's holding that the anti-steering provisions have stifled interbrand competition among credit-card companies with respect to the prices that they charge merchants to use their credit cards. *Compare* Pet. App. 49a-53a (Second Circuit's analysis), *with* Pet. App. 191a-228a (district court's analysis). The Second Circuit's ruling instead hinged on the conclusion that the alleged benefits to Amex cardholders might offset these anticompetitive pricing effects. That was for good reason: *Both* economic theory *and* actual practice illustrate that the anti-steering provisions would have, and have had, anticompetitive effects on merchant prices. Indeed, those effects arise precisely because of the nature of the two-sided platform.

As for economic theory, if merchants cannot steer cardholders from high-cost cards to low-cost cards, it will make little sense for competing credit-card companies to lower the prices that they charge to merchants because that price decrease will not result in a higher market share. That is because, short of not accepting a particular credit card *altogether* for *all* transactions, the merchants do not make the ultimate decision about which credit card will be used for any given transaction. The cardholders do. Without steering, then, merchants have no ability to respond to a credit-card company's lower prices by shifting transactions to the price-cutting company. *See Amicus* Br. of John M. Connor et al. in support of Government's Pet. for Reh'g, at 5-6, *United States v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016) (R.454, No. 15-1672); *see also* Pet. App. 194a-203a.

As for actual practice, the district court found, as a fact, that the anti-steering provisions have allowed "all four networks to raise their swipe fees more easily and more profitably than would have been possible were merchants permitted to influence their customers' payment decisions." Pet. App. 207a. Not only that, it determined that one credit-card company, Discover, "saw an opportunity to leverage its position as the lowest-priced network to gain share." Pet. App. 204a. But that opportunity failed precisely because of the anti-steering provisions. Pet. App. 205a. Those provisions "denied merchants the ability to express a preference for Discover or to employ any other tool by which they might steer share to Discover's lower-priced network." *Id.*

Critically for antitrust purposes, Amex's anti-steering provisions have restricted horizontal *inter-*

brand competition among competing credit-card companies. This reduction of "interbrand competition is important because 'the primary purpose of the antitrust laws is to protect [this type of] competition.'" *Leegin*, 551 U.S. at 890 (quoting *Khan*, 522 U.S. at 15). Indeed, the reduction of *interbrand* competition distinguishes Amex's anti-steering provisions from other vertical restraints that this Court's recent cases have considered; the primary effect of those restraints was theoretically to limit only *intrabrand* competition. *E.g.*, *id.* This reduction instead makes Amex's anti-steering provisions similar in economic effect to horizontal restraints. By hindering the ability of merchants to share information with cardholders about whether a cardholder's use of a card is "cost justified," the provisions have "disrupt[ed] the proper functioning of the price-setting mechanism of the market." *Ind. Fed'n of Dentists*, 476 U.S. at 461-62; *see also* Frankel & Shampine, *supra*, at 672 ("Vertical restrictions on merchants prevent direct competition between the networks from occurring at the point of sale.").

2. *Procompetitive Effects On Cardholder Side.* The Second Circuit believed that the rewards and services that Amex offers to Amex *cardholders* could offset any economic harm from reduced price competition for *merchants*, Pet. App. 49a-53a, and that the Government had not met its burden to prove the "net harm to Amex consumers as a whole," Pet. App. 54a. But the Second Circuit's assumption that these benefits and services to certain cardholders were *automatically* procompetitive was misplaced. To be procompetitive, the rewards and services must arise from Amex's *efficiencies*, not from the overall mar-

ket's pricing *inefficiencies*. And the fact that Amex must resort to the anti-steering provisions is itself compelling evidence that they arise from the latter.

As the district court explained, merchants pass along any higher credit-card prices that arise from the anti-steering provision's anticompetitive effects to *all* of their consumers in the form of higher retail prices for their goods or services. Pet. App. 207a-212a; *cf.* Pet. App. 49a n.52. Thus, with the anti-steering provisions in place, Amex's "customers do not internalize the full cost of their payment choice," Pet. App. 195a, and instead receive a subsidy from other retail customers. This subsidy leads the anti-steering provisions to "distort competitive markets by steering consumers toward more costly and less efficient payment methods." Frankel & Shampine, *supra*, at 672 (discussing interchange fees). In this respect, this case has flipped *Leegin* on its head. The restraint in that case sought to *eliminate* a free-rider problem, 551 U.S. at 890-91; the restraint in this case has *exacerbated* a free-rider problem.

At day's end, it cannot be called an "efficiency" justification for a Visa holder to pay higher prices at the gas station in order to subsidize an Amex holder's frequent flyer miles. Or in the language of economics: "[I]f the effect of the restraint is to increase the cross-subsidization of the users of other platforms to use the given platform, it is to be expected that usage of the platform will increase." *Amicus* Br. of John M. Connor, *supra*, at 8 n.9. But this is "only evidence of distortion in the competitive process, not that the restraint is pro-competitive." *Id.*

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
MICHAEL HENDERSHOT
Chief Deputy Solicitor
HANNAH C. WILSON
M. RYAN HARMANIS
Deputy Solicitors
BRIAN F. JORDAN
Assistant Attorney General
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@
ohioattorneygeneral.gov

Counsel for Petitioner
State of Ohio

JUNE 2017

ADDITIONAL COUNSEL

GEORGE JEPSON
Attorney General
State of Connecticut

LAWRENCE G. WASDEN
Attorney General
State of Idaho

LISA MADIGAN
Attorney General
State of Illinois

TOM MILLER
Attorney General
State of Iowa

BRIAN E. FROSH
Attorney General
State of Maryland

BILL SCHUETTE
Attorney General
State of Michigan

TIM FOX
Attorney General
State of Montana

PETER KILMARTIN
Attorney General
State of Rhode Island

SEAN D. REYES
Attorney General
State of Utah

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont

RECORD AND BRIEFS

No. 16-1454

IN THE
Supreme Court of the United States

OHIO, ET AL.,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR AMERICAN EXPRESS IN OPPOSITION

BENJAMIN J. HORWICH
JUSTIN P. RAPHAEL
MUNGER, TOLLES & OLSON LLP
560 Mission Street
San Francisco, CA 94105
(415) 512-4000

EVAN R. CHESLER
Counsel of Record
PETER T. BARBUR
KEVIN J. ORSINI
RORY A. LERARIS
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
echesler@cravath.com

Counsel for Respondents American Express Company and American Express Travel Related Services Company, Inc.

August 21, 2017

QUESTION PRESENTED

Payment card networks such as respondent American Express ("Amex") compete for a single unit of output—a credit card transaction processed at a merchant. For each such transaction, there must be one customer willing to use the network's card, and one merchant willing to accept it. Thus, a network must appeal to both cardholders and merchants to compete effectively for transactions. To do so, Amex provides incentives to Amex cardholders (cash or reward points), which are paid for by merchants in the form of merchant fees. Nearly a third of all credit card accepting merchants choose not to accept Amex, but merchants that do also agree to nondiscriminatory provisions ("NDPs") by which they commit not to discriminate against Amex cards by steering cardholders to another card at the point of sale. At trial, the United States, joined by Petitioners (and other States that have abandoned their claims) contended that these NDPs violated Section 1 of the Sherman Act by allowing Amex to charge higher merchant fees. Also at trial, the Government's economic expert admitted that merchant fees and cardholder benefits are linked and that a reduction in merchant fees "can harm consumers" by reducing cardholder benefits.

The question presented is whether—given the undisputed relationship between merchant fees and cardholder benefits—the Government failed to carry its burden under the rule of reason when it focused only on the effect of the NDPs on merchant fees, without accounting for their effect on cardholders, or on the volume of transactions.

CORPORATE DISCLOSURE STATEMENT

American Express Company is the parent company of American Express Travel Related Services Company, Inc., and American Express Company is a publicly held company. Berkshire Hathaway, Inc., a publicly held corporation, owns more than 10 percent of the outstanding shares of American Express Company.

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INTRODUCTION

This is a case about credit card networks, which enable a cardholder to pay a merchant for goods and services. Every payment transaction requires a cardholder that wants to buy and a merchant that wants to sell. The payment network (such as Amex) sits in the middle of these two sides and brings them together to complete a transaction using that network's card. Merchants and cardholders are especially interdependent because cardholders find it attractive to use cards accepted by more merchants, and vice-versa. The NDPs concern merchant conduct at the moment a transaction takes place at the checkout counter, when the cardholder decides to use a card that the merchant accepts. A unanimous panel of the Second Circuit therefore held that an antitrust challenge to the NDPs required proof that accounted for both cardholders and merchants.

Even the United States—the lead plaintiff below—acknowledges that the Second Circuit articulated the correct principles of antitrust law. Nonetheless, Petitioners—a handful of the states that joined the United States' challenge, but had no material role in the litigation—ask this Court to reexamine the application of those settled principles to the particular facts of the credit card industry found by the district court.

This case is an especially poor candidate for review. No member of the panel dissented. No judge expressed support for rehearing. No other appellate court has had occasion to apply the relevant antitrust principles to transactions in the credit card industry, or to any industry with similar two-sided

characteristics—let alone reached a result in conflict with the one below. As the United States urges, the petition should be denied because "additional percolation in the lower courts may assist the Court in its application of general antitrust principles to two-sided platforms and to agreements of the sort at issue here." U.S. Opp. 21.

STATEMENT

A. Background

1. Two-Sided Payment Platforms

Credit card networks exist to "facilitat[e] transactions between merchants and their cardholding consumers", operating as what economists call "two-sided platforms". Pet. App. 77a. A two-sided platform brings together "two separate yet interrelated groups of customers who ... rely on the platform to intermediate some type of interaction between them." *Id.* "[U]nlike many two-sided platforms", such as "[n]ewspapers and other advertising-based forms of media", card networks provide transaction services "simultaneously" to merchants and cardholders, who make a "joint decision" to transact. Pet. App. 77a-78a, 81a. Thus, as the district court explained, "card networks are also referred to as two-sided 'transaction markets'—the two sides of the platform are brought together to consummate a single, simultaneous transaction, and the products provided by the platform are consumed in fixed proportions by the consumer and merchant." Pet. App. 78a.

To compete effectively for transactions, a credit card network must account for both merchant and

cardholder demand. Pet. App. 69a. Importantly, the market is characterized by "network effects", meaning that "cardholders benefit from holding a card only if that card is accepted by a wide range of merchants, and merchants benefit from accepting a card only if a sufficient number of cardholders use it." Pet. App. 8a, 79a. Thus, a network must "balance the two sides of its platform" by allocating the costs of the transaction between the merchant on the one side and the cardholder on the other. Pet. App. 9a.

Amex strikes this balance by charging a merchant that chooses to accept Amex a "merchant discount fee", typically calculated as a percentage of the purchase amount. Pet. App. 83a, 86a. Amex uses the vast majority of merchant discount fee revenue to pay valuable benefits to cardholders to incentivize them to obtain and use an Amex card at that merchant rather than cards issued on other networks. Pet. App. 9a-10a, 14a-15a. These benefits, funded by the merchant discount fee, operate as a "negative" price on the cardholder side. Pet. App. 182a n.36. The sum of the cardholder benefits and the merchant fees is referred to as the "two-sided net price", because it is the total price paid by the two sides to compensate the network for completing a single transaction. Pet. App. 49a.

2. Competition in the Credit Card Industry

The credit card industry today is marked by vigorous interbrand competition, with the networks offering cardholder benefits to compete for transactions. It was not always so.

The industry has long been dominated by Visa and MasterCard, which historically were owned by consortia of member banks that issued branded cards to retail banking customers. Pet. App. 12a. Although no longer owned by their member banks, Visa and MasterCard continue to operate as "open-loop" systems involving "issuer" banks that issue Visa and MasterCard cards to consumers, and "acquirer" banks that are responsible for signing up merchants to accept Visa and MasterCard. Pet. App. 13a. By contrast, Amex operates a "closed-loop" network, meaning that it runs the network and typically has direct relationships with Amex cardholders and Amex-accepting merchants. Pet. App. 14a-15a.

Visa and MasterCard command a combined share of 68.3% of credit card transactions. Pet. App. 13a. Amex has a 26.4% share, while Discover has a 5.3% share. *Id.* Visa and MasterCard are also accepted by virtually every card-accepting merchant, but "[a]pproximately three million of the total nine million U.S. merchant locations that accept credit cards—that is, roughly one out of every three—do not accept Amex cards." Pet. App. 17a. As of 2013, there were 432.4 million Visa and MasterCard cards in circulation in the United States, as compared to only 53.1 million Amex cards. E.D.N.Y. Dkt. 447-1 ¶ 18. The vast majority of Amex cardholders also carry a Visa or MasterCard, while a relatively small number of Visa and MasterCard cardholders also carry an Amex card. Tr. 3686:6-20. Thus, "[Amex] may be fairly characterized as a discretionary card for consumers when compared to the ubiquity enjoyed by Visa and MasterCard". Pet. App. 159a.

In its early years, Amex operated as a niche platform used primarily at "travel and entertainment" merchants. Pet. App. 11a. With a limited network, Amex had difficulty competing against Visa, MasterCard and their issuing banks for transactions. *See* Pet. App. 12a. Thus, Amex set out to expand its network by investing billions of dollars into cardholder benefits to incentivize cardholders to use Amex cards over other networks' cards. *See* Pet. App. 16a, 18a. Because higher cardholder demand drives higher spending at merchants, the value Amex delivered to its cardholders, funded by merchant fees, in turn has made Amex's platform more attractive for merchants. *See* Pet. App. 39a-40a.

Recognizing the advantages of Amex's differentiated model, Visa and MasterCard initially responded in two ways. *First*, they enacted "exclusionary rules" prohibiting member banks from issuing Amex cards. Pet. App. 18a-19a. These rules were invalidated as anticompetitive horizontal agreements among the member banks in *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 543 U.S. 811 (2004). *Second*, rather than compete with Amex on the basis of premium rewards, Visa and MasterCard attacked Amex's model with campaigns designed to sow doubts in the minds of cardholders about whether merchants would process Amex transactions. Pet. App. 19a. The express purpose of the campaigns, as described in a contemporaneous presentation to the Visa board of directors, was to "keep Amex as a niche product" by "break[ing]" the premium "success cycle", *i.e.*, Amex's strategy of using the revenue from merchant fees to deliver value to cardholders in the form of cardholder

benefits, thereby enhancing the value of Amex's network to both sides. PX0132 at '930.

Although the Amex model delivered a superior value proposition, the campaigns targeting Amex were "remarkably effective". Pet. App. 19a. By increasing cardholder uncertainty about whether Amex cards would "be accepted and on what terms", fewer cardholders used Amex, which reduced the value to merchants of accepting Amex. Pet. App. 19a-21a.

Amex responded in part by enhancing and enforcing its NDPs, which had existed in Amex's merchant agreements in some form since the 1950s. Pet. App. 19a. The purpose of the NDPs is to encourage welcome acceptance, which means that merchants that choose to accept Amex—and thus enjoy the patronage of Amex cardholders incentivized to spend by the benefits Amex provides—commit to not undermine Amex at the point of sale. Pet. App. 21a. The NDPs govern the precise moment in time at which the two sides of the market interact to jointly consume Amex's services. Amex is not present at that critical moment, and the commitment to welcome acceptance by Amex-accepting merchants is a cornerstone of Amex's differentiated model. *Id.* It minimizes interference with the incentives created by the value Amex delivers to cardholders, builds cardholder confidence in Amex's network, and in turn makes the network more valuable for both merchants and cardholders. *Id.*

Today, with Amex's NDPs in place, the industry is highly competitive and dynamic. Amex's ability to deliver valuable benefits to Amex cardholders has

led its rivals to enhance their own cardholder offerings. Pet. App. 52a. The result has been robust competition for transaction volume, and a substantial increase in output. *Id.* Indeed, "[o]ne of the ironies of this case," as the Second Circuit pointed out, "is that the government, which usually worries about oligopolists engaging in indirect collusion leading to pricing similarities, seeks relief in this case that might drive the three cards to greater similarities", which "could even increase market concentration by reducing Amex's share to Visa's and MasterCard's benefit." Pet. App. 48a-49a n.51.

B. The Government's Case

On October 4, 2010, the United States, eventually joined by seventeen Plaintiff States (collectively, the "Government"), sued Amex, Visa and MasterCard, alleging that the anti-steering provisions in each network's merchant agreements unreasonably restrained trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Visa and MasterCard entered into consent judgments in 2011 and rescinded their anti-steering provisions, while Amex proceeded to trial.

The crux of the Government's case is that, but-for the NDPs, card networks would lower merchant fees to induce merchants to steer cardholders toward whatever network is least expensive for the merchant. The Government contended that proof of such effects on merchant fees would be sufficient to show that the NDPs harm competition, *even if*, as a result, card networks were forced to decrease cardholder benefits. *See* Pet. App. 49a. Indeed, because merchant fees fund cardholder benefits (Pet. App. 9a),

and the Government had no proof that Amex's margins (and therefore prices) were supracompetitive (Pet. App. 53a), a significant reduction in merchant fees necessarily would reduce cardholder benefits, and, by extension, the competition for cardholders that those benefits drive. The Government's expert conceded this dynamic (Tr. 4177:9-13), but the Government's merchant-centric case ignored it.

C. The District Court Decision

Following a bench trial, the district court held that the NDPs violate Section 1. The court recognized that the NDPs are vertical non-price restraints, to which the rule of reason applied. Pet. App. 105a-06a. And the court acknowledged the fundamental two-sided attributes of the industry, the joint and simultaneous demand of merchants and cardholders for transactions, and the "inextricably linked" and "intertwined" nature of both sides. Pet. App. 118a, 185a. These findings were compelled by the trial testimony of the Government's economic expert, Professor Katz, who described these attributes at length, and admitted that, because merchant fees fund cardholder benefits, a reduction in merchant fees "can harm consumers" by reducing cardholder benefits. Tr. 4177:9-13. Professor Katz also explained that "an[y] assessment of market definition, market power and competitive effects should account for the two-sided nature of the market", and that "[i]t is critical not to draw unwarranted and misleading conclusions by focusing solely on one side of a two-sided market." Tr. 4018:13-19, 4037:15-20.

Nonetheless, in holding for the Government, the district court focused on the impact of the NDPs on merchants alone.

First, the district court defined a relevant market comprising "network services", to the exclusion of cardholders, because including cardholders would go "too far" and "frustrate" the analysis. Pet. App. 116a-18a, 122a.

Second, reversing course on the relevance of cardholders, the district court found that Amex has market power as a result of "cardholder insistence"—meaning some portion of Amex cardholders would not shop, or would spend less, at a merchant that chose not to accept Amex. According to the court, cardholder insistence allowed Amex to increase merchant fees without fear of merchants dropping acceptance of Amex. Pet. App. 71a. The court acknowledged that insistence would disappear the moment Amex stopped paying cardholders benefits, but ruled that this fragility of *cardholder* demand was irrelevant to assessing market power over *merchants*. Pet. App. 164a-65a.

Third, the district court held that the Government had demonstrated anticompetitive effects based solely on one-sided proof. The court conceded there was no "empirical evidence that the NDPs have resulted in a higher two-sided price—*i.e.*, that the price charged across Amex's entire platform, accounting for both discount revenue and the expense of providing cardholder rewards, increased as a result of the network's anti-steering rules." Pet. App. 209a. The court nonetheless held that "[p]roof of anticompetitive harm to merchants, the primary

consumers of American Express's network services, is sufficient to discharge [the Government's] burden". Pet. App. 192a. The court also found no reliable evidence of Amex's profit margins, but concluded that Amex's merchant fees were "supracompetitive". Pet. App. 172a-73a, 207a-12a. Moreover, while recognizing that "charge volume is the most direct measure of output in this particular market" (Pet. App. 151a-52a), the court placed no weight on the fact that transaction output has surged, fueled by "ever more robust suites of rewards and other ancillary [cardholder] benefits" (Pet. App. 238a).

D. The Court of Appeals' Decision

In a unanimous panel decision, the Second Circuit reversed. The court of appeals accepted the district court's factual findings, including that the market is two-sided, that cardholder and merchant demand is joint, simultaneous and interdependent, and that the Government failed to prove harm to competition among credit card networks when considering the two-sided nature of the service they provide.[1] It agreed with the district court that the NDPs are vertical non-price restraints, and thus sub-

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[1] An *amicus* brief filed by supermarket and drugstore chains (which are suing Amex based on the NDPs) charges that the court of appeals replaced the district court's findings with "extra-record materials". Merchants Br. 4-9. In fact, the court of appeals expressly accepted and relied on the district court's findings and the undisputed evidence at trial, which support the purported "extra-record" facts to which *amici* point. *Compare* Merchants Br. 6-8, *with, e.g.*, Pet. App. 50a, 68a, 80a-81a, 125a, 128a, 157a, 160a-61a.

ject to full rule of reason review.[2] But it held that the district court erred in applying the rule of reason to the facts of the case.

First, the court of appeals held that the district court erred by excluding cardholders from the relevant market because doing so failed to take into account "commercial realities", including the joint, simultaneous and interdependent nature of cardholder and merchant demand, and feedback effects. Pet. App. 31a-40a.

Second, the court of appeals held that cardholder insistence is not a cognizable source of market power because, as the district court's findings made clear, this cardholder loyalty is not durable and Amex must constantly compete for it with cardholder benefits that other networks can and do attempt to replicate. Pet. App. 40a-48a.

Third, the court of appeals held that the district court "erroneously elevated the interests of merchants above those of cardholders" by allowing the Government to carry its burden without proving the impact of the NDPs on the "the two-sided net price

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[2] The court of appeals noted that "[b]oth the [Government] and the District Court flagged alleged distinctions between the NDPs and other vertical restraints ... in apparent attempts to recast the vertical restraints as horizontal", but explained that it had "never drawn this type of distinction between any varieties of vertical restraints". Pet. App. 30a n.42. Petitioners do not challenge that correct determination. Pet. i; *see Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730-31 n.4 (1988) ("[A] restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement.").

accounting for the effects of the NDPs on both merchants and cardholders." Pet. App. 49a. The court concluded that, applying the correct legal standard to the record, the Government's proof failed as a matter of law to establish that the NDPs adversely affect competition among credit card networks—particularly given the lack of evidence of Amex's two-sided price or profit margins, and the undisputed evidence of increasing output and higher-quality cardholder benefits. Pet. App. 49a-53a. Accordingly, the Second Circuit reversed.

The Government sought rehearing and rehearing *en banc*, with the support of eight *amicus* briefs. The panel denied the request for rehearing. The Second Circuit denied the petition for rehearing *en banc* without requesting a response from Amex or noting any dissent.[3] Pet. App. 326a.

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[3] Many of the same *amici* filed similar briefs in support of the petition. Two briefs were submitted by individual merchants and a merchant trade group. The merchants also have challenged the NDPs in separate litigation and have said their claims are identical to the Government's. Briefs also were submitted by Southwest Airlines and Discover, both of which claim a direct financial interest in the outcome here. Two briefs come from economists and law professors who submitted very similar briefs in support of rehearing by the panel or *en banc*. Another brief comes from an interest group. A final brief, from new *amici* calling themselves "former federal antitrust officials", was submitted by attorneys who predominantly represent antitrust plaintiffs. They attribute the United States' decision not to seek certiorari to government vacancies, but the United States' opposition brief shows that the Acting Solicitor General's decision is characteristically well-considered. As

REASONS FOR DENYING THE PETITION

The Second Circuit's unanimous decision is correct, follows precedent and implicates no lower court conflict. And even if the merits of the Second Circuit's analysis were reasonably debatable among professors and lower-court litigants, this Court's review would be extremely premature. As the United States emphasizes, the implications of the Second Circuit's decision beyond the facts of this case are unclear, "percolation in the lower courts may be especially useful", and *not one appellate jurist* (save those below) has "considered the application of the Sherman Act to two-sided platforms". U.S. Opp. 19-20.

For those reasons, the United States—the lead plaintiff below—properly concedes that its own case does not warrant further review. Petitioners, by contrast, seek this Court's intervention after being passive participants from the moment they joined the case through the Second Circuit's denial of the *en banc* petition.[4] Amex knows of no instance in which the United States as a plaintiff abandoned its enforcement action and this Court nonetheless granted review at the behest of another party. To the contra-

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demonstrated below, *amici* add nothing to cure the insufficiency of the petition.

[4] Of the more than 100 depositions taken by the Government, Petitioners took the lead for none, and asked questions at only three. At trial, the United States handled every witness. Petitioners' appearance at trial was limited to a three-minute summation. On appeal, the United States was lead counsel on all briefs (merits and rehearing petition), and delivered oral argument.

ry, the Court recently denied such a petition. *See United States ex rel. Purcell v. MWI Corp.*, No. 16-361, 137 S. Ct. 625 (2017) (denying certiorari petition filed by a False Claims Act relator when the United States, the lead party below, argued the lower court's decision was erroneous but opposed review). The Court should deny the petition here.

I. The Decision Below Is Correct and Consistent with Precedent.

A. Market Definition

The Second Circuit applied well-settled market definition principles in holding that the district court erred by "excluding the market for cardholders from its relevant market definition". Pet. App. 32a.

The Second Circuit correctly concluded that the district court improperly failed to "consider the feedback effects inherent on the platform by accounting for the reduction in cardholders' demand for cards (or card transactions) that would accompany any degree of merchant attrition" in response to a price increase. Pet. App. 39a.

The court of appeals also followed settled precedent in holding that a relevant market must reflect the "commercial realities" facing consumers. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482 (1992). Applying this rule, the court of appeals correctly held that the market here must "encompass the entire multi-sided platform", including the cardholders whom the district court had excluded. Pet. App. 39a. This holding was premised on the very nature of the service that Amex and its

competitors offer—as Petitioners themselves put it, "bring[ing] *cardholder* customers together with *merchant* customers for ordinary transactions". Pet. i. The Government's own expert economist similarly testified that "[i]t is critical not to draw unwarranted and misleading conclusions by focusing solely on one side of a two-sided market." Tr. 4037:15-20.

The district court's decision to define the market in terms of merchants alone failed to account for the nature of the service that Amex competes to provide, and was therefore inconsistent with the purpose of market definition—"to identify the market participants and competitive pressures that restrain an individual firm's ability to raise prices or restrict output". Pet. App. 32a (quoting *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 496 (2d Cir. 2004)). And the argument that the NDPs have "thwarted" price competition fails for the same reason: it ignores the vigorous competition on the cardholder side of the market driven by cardholder benefits and services that are funded by merchant fee revenue. Given this uncontested interdependence between the two halves of the single product at issue, it is impossible to account for the nature of competition by looking at only half of the equation.

Contrary to Petitioners' claims, the Second Circuit's conclusion that the defined market in this case must include both sides is fully consistent with this Court's precedent.

First, no conflict exists with this Court's precept that a relevant market should comprise "reasonably interchangeable" products. Pet. 19 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966)). As

the United States has recognized, "[t]he court of appeals articulated the correct legal standard". U.S. Opp. 11. The governing antitrust principles are undisputed, and Petitioners simply ask the Court to review the application of settled law to the unique facts of this case.

The reasonable interchangeability test is used to determine whether two or more separate products *compete with each other* in the same relevant market. Here, however, the question is not whether the two sides of a card platform compete with each other (they clearly do not) but the threshold question of whether they are each *part of the same product.* A merchant and a cardholder cannot complete a transaction unless they use the same card network. Only the combination of Amex's services to merchants and cardholders *together* competes with Visa's similar offering. Asking about a merchant's consumption in isolation is like asking about the sound of one hand clapping. This is, moreover, the unavoidable implication of the district court's findings that *transaction* volume "is the most direct measure of output in this particular market", and the proper benchmark for calculating market shares. Pet. App. 151a-52a.

Thus, the fact that a merchant cannot substitute its role (card acceptance) for the cardholder's (card usage) is of no moment. Matching left and right shoes are in a single r arket not because they are substitutes, but because it is appropriate "to combin[e] in a single market a number of different products or services where that combination reflects commercial realities". *Grinnell*, 384 U.S. at 572. Because, as Petitioners themselves explain, card networks' function is "uniting cardholders and mer-

chants" (Pet. 2), dividing cardholders from merchants for analyzing competition among card networks makes no sense.

Second, Petitioners misconstrue the Second Circuit's ruling to argue that it conflicts with *Kodak*, 504 U.S. 451. The unanimous court of appeals did not adopt a new rule requiring that separate markets be consolidated whenever the price in one affects the price in the other. Pet. 20. Rather, the ruling correctly took account of the interdependency of merchant and cardholder demand, on the particular facts as found by the district court. Pet. App. 31a-40a. *Kodak* did not concern two interdependent halves of a single product; it considered copier parts and service of those parts—two products that can be, and often are, sold separately and at different times. *See* 504 U.S. at 475-76 ("[I]t makes little sense to assume, in the absence of any evidentiary support, that equipment-purchasing decisions are based on an accurate assessment of the total cost of equipment, service, and parts over the lifetime of the machine."). For the same reason, Petitioners' analogy to vertically related markets of components and final goods (Pet. 21) is inapposite.

Third, no conflict exists with *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953). As the United States has recognized, this Court "has not squarely considered questions of market definition or proof of anticompetitive effects in cases involving two-sided platforms". U.S. Opp. 19. In *Times-Picayune*, this Court simply held that the defendant lacked market power over advertising. 345 U.S. at 610-13. The Court did not examine competitive effects at all, much less decide whether the

plaintiff had to prove adverse effects across interdependent markets.

More fundamentally, Petitioners' analogy to newspapers underscores their misconception about the nature of credit card networks and the challenged restraints. A reader's decision to purchase a newspaper is not necessarily dependent on any advertiser buying advertising space because many readers buy newspapers to read the news. By contrast, a merchant and cardholder simultaneously use a single network because they want to complete a transaction together. As a result, the "products provided by the [credit card] platform are consumed in fixed proportions" by each side as part of one, simultaneous transaction. Pet. App. 78a. Moreover, because sales to readers in *Times-Picayune* were unrestrained, this Court understood the challenged restraint to "concern[] solely one of these markets"—the market for the sale of advertising to advertisers. 345 U.S. at 610. By contrast, the restraints here govern the precise moment of interaction between the two sides at the point of sale.[5]

Regardless, *Times-Picayune* at most stands for the proposition that a restraint excluding competitors from one side of a two-sided platform can be analyzed without considering the other side. The defendants there were accused of tying sales of adver-

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[5] *Berlyn Inc. v. Gazette Newspapers, Inc.*, 73 F. App'x 576 (4th Cir. 2003), an unpublished decision, is distinguishable for the same reasons. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), would be as well if it had discussed the relevant market, which it did not.

tising that "effectively excluded" other papers from doing business with advertisers. 345 U.S. at 605. The NDPs do not exclude competing networks from merchants' registers or cardholders' wallets; they affect only the joint decision of a merchant and a cardholder about which network they will use to complete a given transaction. *Times-Picayune* does not speak to the relevant market for analyzing competition for such joint transactions.

Fourth, no conflict exists with *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), which analyzed a rule limiting the number of football games colleges could license for television broadcast. *NCAA* is not on point—neither the NCAA, which imposed the rule, nor the product at issue (intercollegiate football games) is two-sided. Rather, the case involved conventional one-sided vertical distribution—the colleges (upstream) selling rights to broadcast football games to the television networks (downstream), which broadcast those games to viewers (the end-consumer). *Id.* at 94-95. And contrary to Petitioners' suggestion, the *NCAA* dissent did not advocate for a two-sided analysis; it merely disagreed about how output should be measured (number of games televised versus number of viewers). Here, no one disputes that the proper measure of output is transaction volume, that a transaction cannot be completed without having one merchant interact with one cardholder both using the same network's services, or that output has been surging in the years since Amex reinforced its NDPs in response to Visa's and MasterCard's attacks. Pet. App. 41a, 52a.

B. Market Power

The Second Circuit correctly held that the Government failed to prove that Amex has market power. "Market power is the power to force a purchaser to do something that he would not do in a competitive market." *Kodak*, 504 U.S. at 464 (internal quotation marks omitted). Amex's lack of market power is unsurprising, given that Amex's competitors have long advertised that millions of merchants do not accept Amex.

The Second Circuit properly held that cardholder "insistence" did not give Amex market power, based on the district court's own finding that Amex must compete fiercely for cardholder loyalty, which would rapidly "dissipate" if Amex were to offer lower value to cardholders than did Amex's rivals. Pet. App. 46a. As the unanimous panel explained, "evidence showing that Amex must compete on price in order to attract consumers does not show that Amex has the power to increase prices to supracompetitive levels." *Id.*

The courts of appeals are in accord on this proposition, and Petitioners do not contend otherwise. *See, e.g.*, *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 58 (2d Cir. 1997) (explaining that established buyer preferences are not a serious entry barrier); *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 797 (1st Cir. 1988) (Breyer, J.) ("[V]irtually every seller of a branded product has *some* customers who especially prefer its product. But to permit that fact alone to show market power is to condemn [vertical restraints] that are bound to be harmless, including some that may serve some

useful social purpose."); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, No. 90-1547, 1991 WL 149249, at *6 (3d Cir. Aug. 9, 1991) ("Nor is intense brand loyalty sufficient to presume market power."), *aff'd en banc*, 959 F.2d 468, *cert. denied*, 506 U.S. 868 (1992).

Notably, Petitioners do not challenge the Second Circuit's market power holding. U.S. Opp. 10 n.2. But market power is a necessary predicate to a firm's ability to harm competition. *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 782 (1999) (Breyer, J., concurring in part and dissenting in part) (explaining that under the rule of reason a violation cannot exist unless "the parties have sufficient market power to make a difference"); *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986) (Easterbrook, J.) ("Firms without power bear no burden of justification."). And there is no question that the theory of harm espoused here turns upon the now legally unsupportable assertion that merchants have no choice but to accept the NDPs (*see* Pet. 33), and that Amex has "forced the entire credit-card industry to channel competition away from merchant fees and into cardholder rewards" (U.S. Opp. 19).

The absence of any challenge to the court of appeals' market power holding causes Petitioners' theory of harm to fall apart. On the unchallenged record, if competition orbits around cardholder rewards, that is only because cardholders find those rewards attractive enough that some merchants, in turn, find it beneficial to accept Amex. Other merchants do not find it beneficial to accept Amex, and so they do not. Merchants are not "forced ... to do something that

[they] would not do in a competitive market." *Kodak*, 504 U.S. at 464 (citation omitted).

C. Anticompetitive Effects

The Second Circuit also applied well-settled rules for analyzing anticompetitive effects, holding that the Government "bore the initial burden to show that Amex's NDPs have 'an actual adverse effect on competition *as a whole* in the relevant market.'" Pet. App. 49a-50a (quoting *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127 (2d Cir. 1995)).

The court of appeals explained that the Government could have met its initial burden under the rule of reason by showing "that cardholders engaged in fewer credit-card transactions (*i.e.*, reduced output), that card services were worse than they might otherwise have been (*i.e.*, decreased quality), or that Amex's pricing was set above competitive levels within the credit-card industry (*i.e.*, supracompetitive pricing)." Pet. App. 52a. Petitioners cited this same menu—reduced output, reduced quality and supracompetitive pricing—long offered by the courts of appeals. *See, e.g.*, *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 264 (2d Cir. 2001) ("[W]hether an actual adverse effect has occurred is determined by examining factors like reduced output, increased prices and decreased quality.") (cited at Gov't C.A. Br. 65); *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 210 (3d Cir. 2005) (anticompetitive effects include "reduced output, raised prices or reduced quality") (cited at Gov't C.A. Br. 65), *cert. denied*, 547 U.S. 1092 (2006).

Applying this standard to the undisputed record, the Second Circuit correctly held that the Government had not met its burden of proving adverse effects. That record showed that "industry-wide transaction volume"—the undisputed measure of output in this market—"has substantially *increased* and card services have significantly *improved* in quality" with the NDPs in place. Pet. App. 52a. On that record, the Second Circuit correctly concluded the Government had not carried its burden. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209, 237 (1993) ("Where, as here, output is expanding at the same time prices are increasing ... a jury may not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level.").

Moreover, both courts below agreed that the record could not support a finding that Amex's prices were supracompetitive, when accounting for both sides. *See* Pet. App. 209a (district court's finding that the record did not provide "a reliable measure of [Amex's] two-sided price that appropriately accounts for the value or cost of the rewards paid to cardholders", or of Amex's margins); Pet. App. 53a (similar conclusion from court of appeals).

Petitioners suggest that the court of appeals contradicted precedent by "shift[ing] to the Government the burden of *disproving* any procompetitive benefits". Pet. 24. The supposed conflict is illusory. Under the rule of reason, a plaintiff always bears the burden to demonstrate competitive harm in "the product market as a whole". *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 45 (1977) (citation omit-

ted). The service that Amex competes to provide is completing payment transactions between a cardholder and a merchant—a service for which neither has any use unless the other does. Thus, Petitioners' argument that a court need not account for cardholders is an invitation to misdefine the competition at issue.[6] Petitioners rely on *United States v. Topco Associates*, 405 U.S. 596 (1972), for the proposition that restraining competition in "one sector of the economy" cannot be justified by "promot[ing] greater competition in a more important sector". Pet. 25 (quoting 405 U.S. at 610). But cardholders do not exist in a separate "sector" of the economy from merchants for purposes of transacting through card networks, whose purpose is to bring them together. *Supra* at 2-3.

Indeed, under this Court's precedent, the interdependence of merchant and cardholder demand *requires* assigning burdens as the court of appeals did. As the Government's expert testified: "[A]n assessment of market definition, market power and competitive effects should account for the two-sided nature of the market". Tr. 4018:13-19. Evidence about the NDPs' effect on merchant fees does not support a confident inference of harm to competition overall,

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[6] Despite marginalizing cardholding consumers, Petitioners and *amici* suggest the district court found two-sided adverse effects by concluding that the NDPs result in higher retail prices to consumers who do *not* use credit cards. Pet. 18. A focus on retail prices is both inconsistent with Petitioners' determination to ignore cardholders, and "erroneous, as it fails to take into account offsetting benefits to cardholders in the form of rewards and other services". Pet. App. 49a n.52.

because such effects necessarily will effect cardholders. Thus, the evidence on which Petitioners would stake their case is at least as consistent with healthy competition as anticompetitive effects. *See* Tr. 4037:15-20 (Government expert testifying: "It is critical not to draw unwarranted and misleading conclusions by focusing solely on one side of a two-sided market."); *cf. Brooke Group*, 509 U.S. at 237 (refusing to recognize anticompetitive effects where "rising prices are equally consistent with growing product demand").

Condemning a restraint on such an ambiguous showing creates an unacceptable risk of false positives that "increase the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage". *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 894-95 (2007); *see also Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) ("The cost of false positives counsels against an undue expansion of [antitrust] liability."). The Second Circuit correctly refused the Government's invitation.[7]

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[7] This concern for avoiding erroneous condemnation of competition also answers Petitioners' complaint (Pet. 16) that proving a case under the rule of reason is too hard. *See, e.g.*, *Leegin*, 551 U.S. at 895 ("*Per se* rules may decrease administrative costs, but that is only part of the equation. Those rules can be counterproductive."); Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135, 155 (1984) (cited at Pet. 17) ("[T]he rule of reason's application to vertical arrangements should err on the side of tolerance" because "[m]ost vertical arrangements are procompetitive.").

II. Petitioners' Other Arguments Are Unpersuasive.

A. Petitioners' Call for "Guidance" Does Not Justify Review.

Petitioners suggest that this case is an opportunity to inject "concrete guidance" into the rule of reason analysis for vertical restraints. That proposal is unsound.

An answer to Petitioners' fact-bound question presented is unlikely to provide definitive guidance beyond this case. Indeed, the *only* way the Court could reach a legal issue of broad significance would be to set a rule for highly dynamic two-sided platforms without the benefit of judicial experience. *Infra* at 30-34 (explaining that, to the extent Petitioners urge the adoption of principles that would apply to other dynamic industries, this Court's decisional process would be greatly aided by percolation). Petitioners identify no case that would have been aided by a decision on the question presented, nor any specific question of law on which they believe concrete guidance is lacking. Indeed, the petition elsewhere contends that the framework applicable to the Government's claims is well established. Pet. 18-25. Petitioners merely disagree with the Second Circuit's application of that framework to the facts, which is no basis for review. *See* Sup. Ct. R. 10.

In cases where, as here, this Court has determined that a particular practice must be analyzed under the rule of reason, it has left the particulars of that case-specific analysis to the lower courts to apply in the varying contexts presented to them. *E.g.*,

FTC v. Actavis, Inc., 133 S. Ct. 2223, 2238 (2013) ("We therefore leave to the lower courts the structuring of the present rule-of-reason antitrust litigation."). It has not tried to take on fine-grained and fact-bound questions about what information is relevant to the analysis of a particular market. *See, e.g.*, *Leegin*, 551 U.S. at 898-99 ("As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses."); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 24 (1979) (concluding that challenged restraint "should be subjected to a more discriminating examination under the rule of reason. It may not ultimately survive that attack, but that is not the issue before us today.").

As Petitioners' own authorities reveal, this Court has generally granted certiorari in antitrust cases to instruct courts on which mode of analysis to apply—*i.e.*, *per se*, "quick look" or rule of reason—and not to superintend the particulars of the analysis as applied to specific facts. *See, e.g.*, *Actavis*, 133 S. Ct. 2223 (addressing mode of analysis for pharmaceutical reverse payment settlement agreements); *Leegin*, 551 U.S. 877 (same for resale price maintenance); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006) (same for joint ventures); *Cal. Dental*, 526 U.S. 756 (same for advertising restrictions by a professional organization); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (same for vertical maximum price restraints); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988) (same for vertical non-price restraints).

The Court has long held that the rule of reason governs a challenge to a vertical non-price restraint, and further review is unnecessary.

B. Petitioners' Arguments About Allocative Efficiency Do Not Warrant Review.

In the guise of discussing "allocative efficiency", Petitioners argue that a rule of reason plaintiff should be able to satisfy its burden by pointing to a structural effect on "the proper functioning of the price-setting mechanism of the market". Pet. 34 (quoting *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 462 (1986)). But where a vertical restraint is concerned, such proof merely establishes that the restraint *restrains* competition (as all vertical restraints do), not that it *harms* competition.

No reason exists for this Court to grant review to pioneer such an approach. The Court has permitted abbreviated proof only in cases involving horizontal restraints that portend the loss of "independent competing entrepreneurs". *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 357 (1982). In fact, the only authority cited by Petitioners (Pet. 34) and their *amici* (*e.g.*, Professors Br. 10-12) for their proposed standard are cases applying quick look analysis to horizontal restraints. But "horizontal restraints are generally less defensible than vertical restraints". *Maricopa Cty.*, 457 U.S. at 348 n.18. Accordingly, this Court has "rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical ones." *Leegin*, 551 U.S. at 888.

Even putting aside "the appreciated differences in economic effect between vertical and horizontal agreements", *id.*, "quick look" presumptions are reserved for restraints for which "the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of [the] restriction ... follow[s] from a quick (or at least quicker) look". *Cal. Dental*, 526 U.S. at 781. Here, Petitioners point to *no* relevant judicial experience—let alone enough to justify "a confident conclusion". In fact, the United States analogizes the NDPs to most-favored-nation provisions as restraints that are vertical in nature but might have some impact on horizontal competition and appropriately notes that "there is no meaningful body of precedent addressing the antitrust status of agreements of that character". U.S. Opp. 21. To avoid condemnation of healthy competition, proper application of the rule of reason depends on an evaluation of "all the circumstances of the case". *Maricopa Cty.*, 457 U.S. at 343.

C. The Role of the Credit Card Industry in the Economy Does Not Justify Review.

Petitioners' discussion of the role and scale of the credit card industry does not justify review. Pet. 26-30. Earlier this Term, the Court declined to review a case involving this industry—a settlement between merchants, Visa and MasterCard, that the petitioners there claimed would "mark[] a sea-change in the payment industry" and "may save merchants between $26.4 and $62.8 billion in acceptance costs over the next decade". Petition, *Photos Etc. Corp. v. Home Depot, U.S.A., Inc.*, No. 16-710, 2016 WL 6994898, at *35-36, *cert. denied*, 137 S. Ct. 1374

(2017). Denial is appropriate here too. Many cases in which this Court's review is sought involve industries of *economic* significance. But the Court seeks to hear matters of recurring *legal* importance. Petitioners have not raised any question of widespread legal importance.

III. Review Would Be Premature Because No Relevant Body of Law—Let Alone a Conflict—Exists in the Courts of Appeals.

As the United States highlights, the "decision does not directly conflict with any decision of this Court or another court of appeals". U.S. Opp. 19. Indeed, the decision below is the *only* federal appellate authority analyzing a vertical restraint in a two-sided market as such, and it is unanimous. Thus, *not one appellate jurist* has endorsed anything like the arguments Petitioners advance. Petitioners do not contend otherwise.[8]

Yet lower courts will undoubtedly have the opportunity to address such restraints, and in a variety of contexts. Indeed, as *amici* concede, "[t]wo-sided platforms are increasingly common" as "modern technologies have led to rapid growth in the number,

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[8] Petitioners suggest a conflict with the Second Circuit's decision in *Visa*, 344 F.3d 229. Pet. 17. Even if such an intracircuit conflict existed, it would not warrant review. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam). And the Second Circuit itself found no conflict when the Government made the same argument in its rehearing petition: *Visa* is inapposite because it involved "*horizontal* restraints" affecting "one particular *level* of competition contained within a two-sided platform". Pet. App. 36a.

size and importance of such firms". Professors Br. 22. Today, some of the most innovative firms and industries now consist of platforms that have some two-sided characteristics—including search engines, ride-sharing, e-commerce, rental exchanges and electronic payments. At the same time, "[t]he economic literature analyzing two-sided platforms is new, complex, and evolving", and has only recently "considered the impact of restraints" in two-sided markets. Economists Br. 7-8. Scholars, the government and the antitrust bar continue to study two-sided markets and their potential for competition concerns.

Petitioners' premature invitation to establish definitive antitrust principles for two-sided platforms now—if any such principles of broad application exist—portends errors that could "chill the very conduct the antitrust laws are designed to protect". *Verizon Commc'ns*, 540 U.S. at 414 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)). *Cf.* Antitrust Modernization Comm'n, *Report and Recommendations* 39 (2007) ("It is important that antitrust develops through mechanisms, such as case law development in the courts and agency guidelines, that allow ongoing reassessments of existing law and economic principles relevant to antitrust analysis.").

As the United States observes, "the Court ordinarily awaits the development of a conflict among the lower courts before exercising its certiorari jurisdiction." U.S. Opp. 21. With no conflict here, the Court should deny review, allow further consideration and experimentation in the lower courts, and avoid putting itself in the position of prematurely and improvidently establishing rules for the Googles

and Ubers of today and tomorrow. *See, e.g.*, *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (Stevens, J., respecting denial of certiorari) ("Petitioner's claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from [other courts'] further study.").

The prudence of allowing percolation here is underscored by the variety of views among Petitioners and their *amici* on what questions this Court should address and how they should be resolved. To cite just a few examples: Whereas some *amici* contend that the court of appeals' ruling on market power "has grave antitrust implications" (RLC Br. 20), Petitioners do not address market power at all in the question presented (Pet. i). Whereas some *amici* contend that the evolving economic literature on two-sided platforms should be given little weight (Merchants Br. 16-25), others argue that courts should pay close heed to that literature (Economists Br. 7-8).[9] Whereas some *amici* argue that the ruling below "provide[s] no guidance for future cases involving two-sided platforms" such as newspapers "that may differ from ... credit card platforms" (Economists Br. 8 n.7), others contend the ruling would apply in any

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[9] In arguing against reliance by courts on economic literature and *amicus* briefs, with more than some irony, the Merchant *amici* chide Professor Willig for not disclosing in his *amicus* brief below that he previously has served as a paid expert for Amex. Those same *amici* neglect to mention that Joseph Stiglitz, their highly-paid expert in their damages case against Amex, filed an *amicus* brief below in which he failed to note his extensive current financial ties to parties whose interests are at stake in this case.

case of a two-sided platform (Professors Br. 22-23). Here, percolation would help clarify the issues that matter to the analysis, illuminate which economic principles are relevant to it and sharpen the points of disagreement for the Court to resolve.

Finally, percolation is particularly appropriate given the fact-bound nature of the rule of reason and the wide range of industries that exhibit two-sided attributes. *Amici* speculate that the Second Circuit's holding could affect theoretical challenges to unspecified conduct in these industries. *E.g.*, Professors Br. 22. But *no* other appellate court has yet analyzed the competitive attributes of two-sided platforms under the rule of reason. Indeed, as Petitioners concede, it is inherent in the rule of reason that "the result of the process in any given case may provide little certainty or guidance about the legality of a practice in another context." Pet. 16 (quoting *Maricopa Cty.*, 457 U.S. at 343). For example, the United States concedes the "idiosyncratic character" of the NDPs (U.S. Opp. 20), and it has successfully argued against the application of the decision below in other contexts. *See United States v. Charlotte-Mecklenburg Hosp. Auth.*, No. 3:16-CV-00311-RJC-DCK, 2017 WL 1206015, at *9 (W.D.N.C. Mar. 30, 2017) (declining to grant defendants judgment based on the decision below because "the Second Circuit's analysis is deeply rooted in the details and dynamics of the credit-card industry").

This Court should articulate antitrust principles with the benefit of concrete judicial experience. Different courts assessing restraints in different two-sided markets should "serve as laboratories in which the issue receives further study" before this Court

settles the question. *Lackey*, 514 U.S. at 1047 (Stevens, J., respecting denial of certiorari) (citation omitted).

IV. Recognized Defects in the Government's Proof Make this Case a Poor Vehicle.

In the long term, if the antitrust issues arising from two-sided markets prove controversial and recurring, this Court will have future opportunities to review them. But in the short term, this case presents a particularly poor vehicle because the Government's proof was insufficient to carry even the burden it proposed.

First, the district court defined a relevant market limited to the provision of "network services", *i.e.*, the service of facilitating the transaction for the merchant over the network. But this is only one component of what Amex and other credit card platforms do. They also process transactions for cardholders, provide other services such as rewards, and acquire merchants for the network. The cost of these services is covered by the merchant discount fee. Indeed, the vast majority of Amex's merchant discount fee is used to pay for cardholder services (mainly rewards), while much smaller components cover acquiring and network services.

On this score, the district court's decision is at war with itself, and the record lacks evidence that could support Petitioners' burden. In a market for processing transactions for merchants alone, the relevant "price" for purposes of analyzing competition is the fee for that service, *i.e.*, the network services component of the merchant discount fee. But that is

not the price the district court used to analyze market power and competitive effects. As the court of appeals noted, the district court looked at "the full merchant-discount rate, not simply the fees associated with 'network services'". Pet. App. 37a-38a n.45. The court defined a market for one service, but used prices for a larger bundle of services.

The court of appeals concluded that it "need not decide here whether this inconsistency constitutes error because, in any event, the District Court defined the relevant market incorrectly." *Id.* But it is irreparable error: The Government advocated a market for network services to merchants, and there is *no record evidence* of an Amex "network service price". Amex does not charge merchants separately for network services. Nor is it possible to derive the network service component of Amex's merchant fee from the record; that would, at a minimum, require subtracting the cost of rewards, of which the district court found there was no reliable evidence. Pet. App. 209. Thus, resolving the question presented regarding the relevant market in Petitioners' favor would lead to the conclusion that Petitioners adduced no proof of harm to competition in that market.

Second, even looking at the wrong price (the merchant fee), the record lacks another piece of evidence necessary to establish a price-based case of harm.

A "claim that a defendant set supracompetitive prices [established] through direct evidence" requires "an analysis of the defendant's costs," including "that the defendant had an 'abnormally high price-cost margin'". *Mylan Pharm. Inc. v. Warner Chilcott Pub.*

Ltd. Co., 838 F.3d 421, 434 (3d Cir. 2016) (quoting *Geneva Pharm.*, 386 F.3d at 500); *accord Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 666 (7th Cir. 2004) (Easterbrook, J.).

The district court found there was no reliable evidence of Amex's costs, and thus no "reliable measure of American Express's per transaction margins across its industry groups". Pet. App. 172a-73a.[10] Accordingly, whatever price is used, it would be impossible to conclude on this record that that price is supracompetitive and thus indicates that the NDPs harm competition.

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[10] The United States suggests that it proved Amex's prices are supracompetitive because when Amex increased its fees for certain merchants as part of its "value recapture" program, those increases "were not wholly offset by additional rewards expenditures or otherwise passed through to cardholders". U.S. Opp. 18 n.4; Pet. App. 209a. However, "the fact remains that 'the evidentiary record does not include a reliable measure of the two-sided price charged by American Express that correctly or appropriately accounts for the network's expenses on the cardholder side of the platform'", and "[a] finding that not every dime of merchant fees is passed along to cardholders says nothing about other expenses that Amex faces, let alone whether its profit margin is abnormally high." Pet App. 51a.

CONCLUSION

The petition for a writ of certiorari should be denied.

August 21, 2017

Respectfully submitted,

BENJAMIN J. HORWICH
JUSTIN P. RAPHAEL
MUNGER, TOLLES & OLSON LLP
560 Mission Street
San Francisco, CA 94105
(415) 512-4000

EVAN R. CHESLER
Counsel of Record
PETER T. BARBUR
KEVIN J. ORSINI
RORY A. LERARIS
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
echesler@cravath.com

Counsel for Respondents American Express Company and American Express Travel Related Services Company, Inc.

RECORD AND BRIEFS

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No. 16-1454

In the Supreme Court of the United States

OHIO, ET AL., PETITIONERS

v.

AMERICAN EXPRESS COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
PATRICIA A. BRINK
Director of Civil Enforcement
KRISTEN C. LIMARZI
ROBERT B. NICHOLSON
JAMES J. FREDRICKS
NICKOLAI G. LEVIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The private respondents operate the American Express credit-card network. In this antitrust enforcement action, the United States and a group of States challenged "anti-steering" rules that respondents impose on merchants that accept American Express cards. Those rules prohibit merchants from encouraging their customers to use other credit cards, which often charge the merchants lower fees. Applying the rule of reason, the district court held that the anti-steering rules violate Section 1 of the Sherman Act, 15 U.S.C. 1. The court found that the rules stifle price competition among credit-card networks, allowing *all* networks to raise their merchant fees and forcing merchants to charge higher prices to retail consumers as a result.

The court of appeals reversed. It did not question the district court's finding that the anti-steering rules thwart price competition, raise merchant fees, and inflate retail prices. But the court emphasized that the credit-card industry is "two-sided," in that networks compete to attract both merchants and cardholders. And the court held that the United States and the States had not made a prima facie showing that the anti-steering rules unreasonably restrain trade because they had not sufficiently demonstrated that the rules harm *cardholders* as well as merchants. The question presented is as follows:

Whether proof that respondents' anti-steering rules thwart interbrand price competition, raise merchant fees, and inflate retail prices was sufficient to make out a prima facie case under the rule of reason.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-58a) is reported at 838 F.3d 179. The opinion of the district court (Pet. App. 63a-259a) is reported at 88 F. Supp. 3d 143.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 2016. A petition for rehearing was denied on January 5, 2017 (Pet. App. 324a-326a). On March 24, 2017, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including May 5, 2017. On April 24, 2017, Justice Ginsburg further extended the time within which to file a petition to and including June 2, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The private respondents operate one of the country's four major credit-card networks, American Express (Amex). In 2013, the Amex network captured 26.4 percent of all credit-card transaction volume. Pet. App. 13a. The rest was divided among Visa (45 percent), MasterCard (23.3 percent), and Discover (5.3 percent). *Ibid.* Together, the four networks processed nearly $2.4 trillion in credit-card transactions. *Id.* at 74a.

Amex cards are accepted by merchants that account for more than 90 percent of credit-card transactions by dollar value, including virtually all of the country's largest merchants. Pet. App. 188a, 224a. To accept Amex cards, a merchant must enter into a contract with respondents and agree to pay a "merchant discount fee" equal to a percentage of each transaction. *Id.* at 15a. For example, a merchant that accepts an Amex card for a $100 purchase might receive only $97—the purchase price less a three-percent merchant discount fee. Visa and MasterCard also charge merchant discount fees, though their fees are structured somewhat differently because Visa and MasterCard use a different business model. *Id.* at 13a-14a.[1]

Respondents have traditionally charged merchants higher fees than other networks, which respondents use in part to fund rewards and other benefits for Amex cardholders. Pet. App. 68a, 175a-180a. Beginning

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[1] Visa and MasterCard operate "open-loop" systems in which "acquiring" banks act as intermediaries between the credit-card networks and merchants, and "issuing" banks act as intermediaries between the networks and individual cardholders. Pet. App. 13a-14a, 81a-83a (citation omitted). Respondents, in contrast, operate a "closed-loop" system in which they typically maintain direct relationships with cardholders and merchants. *Id.* at 14a-15a, 83a-84a.

around 1990, Visa and MasterCard highlighted their lower fees and urged merchants to encourage their customers to use Visa and MasterCard instead of Amex—for example, by displaying signs stating "We Prefer Visa." *Id.* at 91a-92a. Combined with other marketing strategies, those competitive efforts "were remarkably effective" and caused a substantial drop in respondents' market share. *Id.* at 19a; see *id.* at 92a.

Respondents reacted by tightening the "anti-steering" rules in their merchant contracts to "to stifle any further steering or preference campaigns." Pet. App. 200a, 202a; see *id.* at 19a, 92a-93a. The anti-steering rules bar merchants that accept Amex cards from offering customers discounts or incentives to use other cards, expressing a preference for other cards, or even disclosing their relative costs of accepting different cards. *Id.* at 19a-20a, 100a-101a. The rules prohibit those actions even when a customer does not have an Amex card or presents a different card. *Ibid.* Respondents "actively monitor[]" compliance with the rules and have "vigorously enforce[d]" them to stamp out a variety of attempts by merchants to encourage their consumers to use less-expensive rival cards. *Id.* at 102a-103a; see *id.* at 103a-104a.

2. In 2010, the United States and a group of States sued respondents, along with Visa and MasterCard, alleging that the networks' anti-steering rules unreasonably restrained trade in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Pet. App. 21a-22a. Visa and MasterCard entered into consent judgments and rescinded their anti-steering rules. *Id.* at 22a. Respondents proceeded to trial. After a seven-week bench trial, the district court held that the anti-steering rules violate Section 1 under the rule of reason. *Id.* at 63a-259a.

a. "The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of [Section] 1." *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 885 (2007). It looks to "the restraint's history, nature, and effect," *ibid.* (citation omitted), and asks whether a restraint "merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition," *Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918). The plaintiff in a rule-of-reason case bears the initial burden to show that the challenged restraint is "*prima facie* anticompetitive." *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 771 (1999). If the plaintiff makes that showing, the burden shifts to the defendant to establish any "procompetitive justification." *Ibid.*; see Pet. App. 108a-109a.

b. The district court began its rule-of-reason analysis by defining the relevant antitrust market, which establishes the "context for the remainder of [the] analysis." Pet. App. 111a; see *id.* at 111a-148a. An antitrust market is defined as those products "that have reasonable interchangeability for the purposes for which they are produced," such that customers would switch from one product to another if faced with a price increase. *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956). Here, the district court concluded that the market affected by the anti-steering rules is the market for "general purpose credit and charge card network services" of the type that respondents provide to merchants. Pet. App. 112a-113a.

The district court rejected respondents' contention that this market definition should be expanded to include services to cardholders as well as merchants. Pet. App. 114a-122a. The court agreed with respondents

that the credit-card business is "two-sided," in that credit-card networks compete to attract both merchants and cardholders. *Id.* at 121a-122a; see *id.* at 77a-78a. The court emphasized, however, that the services respondents provide to merchants are not interchangeable with the services they provide to cardholders. *Id.* at 118a-119a.

Although the district court rejected respondents' proposed market definition, it recognized that the "two-sided" nature of respondents' platform is relevant to the antitrust inquiry because "the antitrust significance of a restraint that nominally affects conduct on only one side of [respondents'] platform cannot be assessed without considering its impact on the other side of the platform." Pet. App. 121a-122a. The court thus considered the interdependence between the merchant and cardholder sides of respondents' platform throughout its rule-of-reason analysis. *Ibid.*

c. Under the rule of reason, the plaintiff has two ways of establishing a prima facie case that the challenged restraint adversely affects competition. The indirect method requires a showing that the defendant has market power and that the restraint is potentially anticompetitive. Pet. App. 108a-109a. The direct method requires a showing of "an actual adverse effect on competition." *Id.* at 108a (citation omitted). Here, the district court held that the United States and the States had carried their burden under both methods. *Id.* at 148a-228a.

i. The district court first held that respondents have market power. Pet. App. 148a-191a. The court explained that respondents capture 26.4 percent of the market for network services, a concentrated market with significant barriers to entry. *Id.* at 150a-156a. The

court noted that respondents' market power is magnified by "cardholder insistence"—the fact that many merchants cannot practically refuse to accept Amex cards because many of their customers would shop elsewhere if they did so. *Id.* at 156a-165a. The court also relied on respondents' pricing, including their proven ability to significantly increase fees without causing merchants to stop accepting Amex cards. *Id.* at 165a-180a.

ii. The district court further held, in the alternative, that respondents' anti-steering rules had caused "actual, sustained adverse effects on competition." Pet. App. 193a (citation omitted); see *id.* at 191a-228a. The court found that "[p]rice competition is a critical avenue of horizontal interbrand competition, and yet it is frustrated to the point of near irrelevance in the network services market as a result of [respondents' anti-steering rules]." *Id.* at 195a. The court explained that "[s]teering is a lynchpin to inter-network competition on the basis of price" because, once a merchant decides to accept cards from a particular network, the choice of the card used for a particular transaction lies with the cardholder. *Id.* at 196a. By barring merchants from encouraging cardholders to use less-expensive cards, the anti-steering rules ensure that "there is virtually no check on the networks' incentive or ability to charge higher prices to merchants, so long as the network's pricing is below the level at which a rational merchant would drop acceptance entirely." *Id.* at 197a.

The district court also found that the anti-steering rules "render it nearly impossible" for a new network to enter the market "by offering merchants a low-cost-alternative to the existing networks." Pet. App. 203a. The court explained that Discover had tried to pursue

such a low-fee strategy in the 1990s and had been thwarted by rules that "denied merchants the ability to * * * steer share to Discover's lower-priced network." *Id.* at 205a. Discover therefore had "abandoned its low-price business model" and had raised its merchant fees to align with those charged by Visa and MasterCard. *Id.* at 206a.

The district court further found that, by stifling price competition, the anti-steering rules "allowed all four networks to raise their [merchant] fees more easily and more profitably." Pet. App. 207a; see, *e.g.*, *id.* at 166a-172a (describing respondents' "Value Recapture" initiative, which significantly raised prices over a five-year span without causing merchants to stop accepting Amex cards). The court emphasized that those higher merchant fees had "also resulted in increased prices for consumers" because merchants "pass most, if not all, of their additional costs along to consumers in the form of higher retail prices." *Id.* at 210a-211a.

d. The district court's findings placed on respondents the burden of proving that the anti-steering rules had procompetitive benefits, and the court held that respondents had not carried that burden. Pet. App. 228a-258a. *Inter alia*, the court rejected respondents' contention that the rules are justified to protect Amex's "differentiated business model," which relies on charging higher merchant fees to offer more generous cardholder rewards. *Id.* at 229a-236a. The court held that, to find the anti-steering rules reasonable "because they shield [respondents'] preferred business strategy from a legitimate form of interbrand competition, especially competition on the basis of price, would amount to 'nothing less than a frontal assault on the basic policy of the

Sherman Act.'" *Id.* at 235a (quoting *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 695 (1978)).

3. The court of appeals reversed and directed the entry of judgment for respondents. Pet. App. 1a-58a.

a. The court of appeals first held that the district court had "erred in excluding the market for cardholders from its relevant market definition." Pet. App. 32a; see *id.* at 31a-40a. The court emphasized the "interdependence" of credit-card networks' competition for merchants and their competition for cardholders, and it stated that separating those two avenues of competition into different antitrust markets could allow "legitimate competitive activities in the market for [cardholders] to be penalized no matter how output-expanding such activities would be." *Id.* at 35a.

b. The court of appeals next held that the district court had erred in holding that respondents have market power. Pet. App. 40a-48a. It concluded that the district court should not have focused on increases in respondents' merchant fees because respondents use a portion of those fees to provide greater cardholder rewards (which provide the functional equivalent of reduced prices for cardholders). *Id.* at 43a-44a. The court stated that the district court should have calculated Amex's "two-sided price"—that is, the aggregate amount charged to both merchants and cardholders. *Id.* at 44a (citation omitted). The court also held that the district court had erred in relying on "cardholder insistence" as evidence of market power. *Id.* at 45a-48a. The court reasoned that cardholders insist on using Amex cards only because they like the rewards and other services that Amex provides, and it believed that "so long as Amex's market share is derived from cardholder satisfaction, there is no reason to intervene." *Id.* at 48a.

c. Finally, the court of appeals held that the district court had erred in holding that the United States and the States had made a prima facie case that the anti-steering rules have an actual adverse effect on competition. Pet. App. 49a-53a. The court did not question the district court's finding that the anti-steering rules stifle price competition among the networks and thereby cause merchants (and their customers) to pay more. But the court held that such harms were insufficient to establish a prima facie case because the district court had "failed to consider the two-sided net price accounting for the effects of the [anti-steering rules] on both merchants and cardholders." *Id.* at 49a. To prove anti-competitive effects in the form of higher prices, the court stated, the United States and the States were required to provide at minimum a "reliable measure of American Express's two-sided price that appropriately account[ed] for the value or cost of the rewards paid to cardholders." *Id.* at 53a (citation omitted). The court also stated that the United States and the States bore the "initial burden" to show that the anti-steering rules "made *all* Amex consumers on both sides of the platform —*i.e.*, both merchants and cardholders—worse off overall." *Id.* at 51a.

4. The court of appeals denied the United States' petition for rehearing and rehearing en banc. Pet. App. 324a-326a.

ARGUMENT

Petitioners contend (Pet. 18-25, 30-35) that the district court's findings established a prima facie case that the anti-steering rules unreasonably restrain trade, and that the court of appeals erred in holding otherwise. The United States agrees. The court of appeals seriously departed from sound antitrust principles, and its

decision leaves in place restraints that thwart price competition in an important sector of the economy and inflate the retail prices paid by all consumers.

Nonetheless, the United States has not sought this Court's review because the case does not satisfy the Court's traditional certiorari standards. See Sup. Ct. R. 10. The court of appeals rested its decision almost entirely on the "two-sided" nature of the credit-card industry, and neither this Court nor any other circuit has squarely considered the application of the antitrust laws to two-sided platforms as such. Consistent with its usual practice of awaiting further percolation in the lower courts before taking up such novel legal issues, the Court should deny review here.

1. The district court found that respondents' anti-steering rules stifle competition among credit-card networks, thereby increasing merchant fees, blocking low-cost competitors, and inflating the retail prices paid by all consumers. Although the court of appeals did not overturn any of those findings, it concluded that they do not establish even a prima facie case of an antitrust violation because (a) the relevant market must be defined to include cardholders as well as merchants, and (b) proof that a restraint thwarts competition and inflates prices on one side of a two-sided market is insufficient to establish a prima facie case that it unreasonably restrains trade. As petitioners explain (Pet. 18-25), both of those holdings were wrong.[2]

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[2] The court of appeals also held that the United States and the States had failed to establish a prima facie case under the indirect method because respondents do not have market power. Pet. App. 40a-48a. Petitioners do not seek further review of that holding. See Pet. i, 18-25.

a. A rule-of-reason analysis focuses on the relevant antitrust market, which is "the area of effective competition" directly and immediately affected by the challenged restraint. *United States* v. *E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957). An antitrust market is "composed of products that have reasonable interchangeability for the purposes for which they are produced." *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956) (citation omitted); see, *e.g.*, *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 482 (1992); *United States* v. *Continental Can Co.*, 378 U.S. 441, 449 (1964). "Because the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the 'relevant market' rests on a determination of available substitutes." *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986) (Bork, J.), cert. denied, 479 U.S. 1033 (1987). The market thus "must be drawn narrowly" to include only products that are reasonable substitutes. *Times-Picayune Publ'g Co.* v. *United States*, 345 U.S. 594, 612 n.31 (1953); see 2B Phillip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 565a, at 430 (4th ed. 2014) ("[A] relevant market consists only of goods that are reasonably close *substitutes* for one another.").

The court of appeals articulated the correct legal standard, explaining that the relevant antitrust market should be defined to include "products 'reasonably interchangeable by consumers for the same purposes.'" Pet. App. 32a (citation omitted). But the court never explained how the services that respondents provide to merchants are "reasonably interchangeable" with the services that respondents provide to cardholders. They

are not. A retailer facing an increase in respondents' merchant fees could not, for example, avoid those fees by becoming an Amex cardholder instead of a merchant that accepts Amex cards.

Rather than faithfully applying the "reasonably interchangeable" standard, the court of appeals emphasized that respondents' competition for merchants and their competition for cardholders are interdependent. Thus, the court of appeals observed that "the price charged to merchants necessarily affects cardholder demand, which in turn has a feedback effect on merchant demand." Pet. App. 39a. But as petitioners explain (Pet. 20-21), it is common for prices in one market to affect prices in another. That sort of indirect effect does not mean that the relevant products are reasonably interchangeable or that they should be collapsed into a single market for purposes of antitrust analysis. See, *e.g.*, *Eastman Kodak*, 504 U.S. at 463, 481-482 (distinguishing the markets for photocopier replacement parts and services from the market for photocopiers). "[T]he fact that a firm obtains its profits from two different, non-substitutable groups does not serve to place the two groups into the same market." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 565, at 104 (Supp. 2017) (Areeda & Hovenkamp).

The court of appeals also placed great weight on the fact that the credit-card industry is two-sided, so that networks must attract both merchants and cardholders in order to succeed. Pet. App. 39a-40a. But where, as here, the different sides of a firm's two-sided platform involve distinct competition and products that are not substitutes, they are properly analyzed as separate antitrust markets. That point is well illustrated by this

Court's decision in *Times-Picayune Publishing*, which involved a newspaper publisher's requirement that advertisements appear in both its morning and evening papers. The Court explained that "every newspaper is a dual trader in separate though interdependent markets" serving advertisers and readers—that is, that the publisher in effect had a two-sided platform. 345 U.S. at 610. But because the challenged restraint "concern[ed] solely one of these markets," the Court limited the relevant market to reasonable substitutes for newspaper advertising; it did not treat the two sides of the platform taken together as a single market. *Ibid.*; see *id.* at 612 & n.31.

Like the markets for newspaper advertisers and readers, the markets for merchants and cardholders are distinct spheres of competition, "involving different sets of rivals and the sale of separate, though interrelated, products and services to separate groups of consumers." Pet. App. 119a. By collapsing the two into a single antitrust market, the court of appeals severed market definition from its purpose and "prevent[ed] the relevant-market inquiry from accurately answering the questions for which it is asked." Law Professor Amicus Br. 5.

b. Even under the court of appeals' flawed definition of the relevant antitrust market, the district court's findings were sufficient to establish a prima facie case that the anti-steering rules unreasonably restrain competition.

i. Respondents' anti-steering rules are vertical restraints subject to the rule of reason, rather than to the per se rule that is often applied to horizontal restraints. Pet. App. 29a-30a. But unlike resale-price-maintenance agreements and many other vertical restraints, the anti-steering rules do not "reduc[e] *intra*brand competition

—the competition among retailers selling the same brand"—in order to "stimulate *inter*brand competition." *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 890 (2007) (emphases added); see, *e.g.*, *State Oil Co.* v. *Khan*, 522 U.S. 3, 14-15 (1997). Instead, the purpose and effect of the anti-steering rules is to suppress *inter*brand competition between respondents and their rival credit-card networks by making it impossible for merchants to encourage consumers to use cards that cost the merchants less. To that end, the anti-steering rules restrict not simply the merchants' interactions with Amex customers, but their pricing and other behavior towards non-Amex customers as well.

The district court's extensive factual findings describe the unsurprising results of suppressing price competition among competing credit-card networks. The anti-steering rules "create a competitive environment in which there is virtually no check on the networks' incentive or ability to charge higher prices to merchants," so long as a network's prices remain below the level that would cause the merchant to stop accepting its cards altogether. Pet. App. 197a. The record demonstrates that the rules blocked Discover's low-cost strategy and prevented merchants from steering their customers to use lower-cost cards. *Id.* at 201a-202a, 208a-209a. As a result, the anti-steering rules "have allowed all four networks to raise their swipe fees." *Id.* at 207a; see, *e.g.*, *id.* at 166a-172a. Those higher fees, in turn, have resulted in "higher retail prices" for consumers—including both consumers who use Amex cards and those who do not. *Id.* at 210a-211a. The financial impact on Amex cardholders is offset, at least in part, by respondents' cardholder rewards. *Ibid.* But consumers who use cash, debit cards, and lower-reward

credit cards—who tend to be less affluent—also face higher retail prices yet "do not receive any of the premium rewards or other benefits conferred by American Express on the cardholder side of its platform." *Id.* at 211a.

ii. The court of appeals deemed those findings legally insufficient to establish even a prima facie case that the anti-steering rules unreasonably restrain trade because—in the court's view—they did not adequately account for the anti-steering rules' purported benefits to Amex cardholders. At times, the court appeared to fault the United States and the States for failing to account for all possible procompetitive benefits of the anti-steering rules at the first step of the burden-shifting framework. For example, the court stated that the United States and the States bore the "initial burden" of "show[ing] that the [anti-steering rules] made *all* Amex consumers on both sides of the platform—*i.e.*, both merchants and cardholders—worse off overall." Pet. App. 51a; see *id.* at 49a n.52 (faulting the district court for "fail[ing] to take into account offsetting benefits to cardholders"); *id.* at 54a (requiring proof of "net harm" to cardholders and merchants).

To the extent that the court of appeals' opinion can be read to require antitrust plaintiffs to account for a restraint's potential procompetitive benefits in establishing a prima facie case, it seriously distorted the burden-shifting framework that governs rule-of-reason litigation. Under that framework, a plaintiff carries its initial burden by showing that the challenged restraint is "*prima facie* anticompetitive." *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 771 (1999). That showing "place[s] the burden of procompetitive justification on [the defendant]," *ibid.*, which is responsible for establishing

any "legitimate justifications," *FTC* v. *Actavis, Inc.*, 133 S. Ct. 2223, 2236 (2013); see Areeda & Hovenkamp ¶ 1505, at 171 ("The defendant, being the author of the restraints, is in a better position to explain why they are profitable and in consumers' best interests."). Under established law, it is thus the defendant's burden to establish a challenged restraint's procompetitive benefits, not the plaintiff's initial burden to anticipate and refute them.[3]

iii. The court of appeals' opinion is also susceptible to a narrower reading, under which the court deemed the district court's factual findings insufficient to make out a prima facie case under the particular theory that the court of appeals understood the United States and the States to have advanced here. The court of appeals stated that the United States and the States could have carried their burden of proving actual anticompetitive effects by showing "that cardholders engaged in fewer credit-card transactions (*i.e.*, reduced output), that card services were worse than they might otherwise have been (*i.e.*, decreased quality), or that Amex's pricing was set above competitive levels within the credit-card industry (*i.e.*, supracompetitive pricing)." Pet. App. 52a. The court understood the United States and the States to have relied on supracompetitive pricing, but it

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[3] In one sentence of its opinion, the court of appeals acknowledged that "[w]hether the [anti-steering rules] had pro-competitive effects on cardholders—let alone whether any alleged procompetitive effects on cardholders outweigh 'anticompetitive' effects on merchants—has no bearing on whether [the United States and the States] carried their initial burden." Pet. App. 51a. That statement, however, came only two sentences after the court's assertion that the United States and the States bore the "initial burden" of "show[ing] that the [anti-steering rules] made *all* Amex consumers on both sides of the platform * * * worse off overall." *Ibid.*

deemed proof of inflated prices charged to *merchants* insufficient because—in the court's view—the relevant market includes cardholders as well.

The court of appeals stated, for example, that the district court had "failed to consider the two-sided net price accounting for the effects of the [anti-steering rules] on both merchants and cardholders." Pet. App. 49a. The court emphasized that "the revenue earned from merchant fees funds cardholder benefits," which effectively reduce prices on the cardholder side of the market. *Id.* at 50a. The court concluded that the United States and the States could not carry their burden of showing actual anticompetitive effects using evidence of increased prices absent "a reliable measure of [respondents'] two-sided price that appropriately accounts for the value or cost of the rewards paid to cardholders." *Id.* at 53a (citation omitted).

The court of appeals erred in holding that proof that the anti-steering rules block competition and inflate fees charged to merchants was insufficient to establish a prima facie case absent evidence of an increase in respondents' "two-sided" price. Federal antitrust law "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress." *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958). Preserving interbrand price competition is especially important because price is the "central nervous system of the economy," *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940), and "competitive pricing [is] the free market's means of allocating resources." *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 23 (1979).

Indeed, the "Sherman Act was enacted to assure customers the benefits of price competition." *Associated Gen. Contractors of Cal., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 538 (1983).

Given the central importance of price competition to the antitrust laws, the district court's finding that the anti-steering rules blocked such competition and inflated prices charged to merchants was sufficient to establish a prima facie case that the rules unreasonably restrain trade. "Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition." *NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 (1984). The district court's factual findings establish that, at a minimum, respondents' anti-steering rules had an actual adverse effect on competition on the merchant side of the two-sided market identified by the court of appeals. Although we are not aware of any prior decision squarely addressing the issue, such a showing of adverse effects on competition in one side of a two-sided market should suffice to establish a prima facie case even absent proof that the challenged restraint increased the defendant's aggregate or "two-sided" price.[4]

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[4] In fact, the United States and the States showed—and the district court found—that the higher merchant fees made possible by respondents' anti-steering rules "were not wholly offset by additional rewards expenditures or otherwise passed through to cardholders." Pet. App. 209a. The anti-steering rules thus *did* "result[] in a higher net price" on both sides of respondents' platform. *Ibid.*; see *id.* at 166a-167a ("Because [respondents'] Value Recapture initiatives were not paired with offsetting adjustments on the cardholder side of the platform, the resulting increases in merchant pricing are properly viewed as changes to the net price charged across Amex's integrated platform.").

Respondents are free to charge higher merchant fees in order to fund more generous cardholder rewards. Under the antitrust laws, however, that strategy must succeed or fail under conditions of market competition. As the district court explained, the Sherman Act "does not permit [respondents] to decide on behalf of the entire market which legitimate forms of interbrand competition should be available and which should not." Pet. App. 240a; accord Areeda & Hovenkamp ¶ 1505, at 170. Yet that is exactly what the court of appeals allowed: Respondents' anti-steering rules have essentially forced the entire credit-card industry to channel competition away from merchant fees and into cardholder rewards. Even if price competition on the cardholder side of the market entirely offset the higher merchant fees—which it did not, see note 4, *supra*—restraints that create such a substantial distortion in market competition are properly viewed as at least prima facie anticompetitive. The court of appeals erred in holding otherwise.

2. Although the court of appeals' decision was erroneous, this case does not satisfy this Court's traditional standards for certiorari. See Sup. Ct. R. 10. Most importantly, the court of appeals' decision does not directly conflict with any decision of this Court or another court of appeals. This Court has decided antitrust cases involving two-sided platforms, including *Times-Picayune Publishing*. But the Court has not squarely considered questions of market-definition or proof of anticompetitive effects in cases involving two-sided platforms as such. And so far as we are aware, no other court of appeals has specifically considered the application of the Sherman Act to two-sided platforms either.

In addition, the scope of the court of appeals' decision is unclear. *Inter alia*, the court emphasized that

"[m]arket definition is a deeply fact-intensive inquiry," and it did not suggest that its holding in this case would extend to *all* cases involving industries that might be described as two-sided. Pet. App. 32a (citation omitted). To the contrary, the court distinguished an earlier decision in which it had defined *separate* markets for cardholders and merchants in the very industry that is at issue here. *Id.* at 33a-36a (citing *United States* v. *Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), cert. denied, 543 U.S. 811 (2004)); see *id.* at 35a ("The relevant market in this case is not the same as the relevant market in *Visa*.").[5]

Further percolation in the lower courts may be especially useful because of the idiosyncratic character of the agreements at issue here. Because Amex and the merchants that accept Amex cards stand in a vertical rather than a horizontal relationship, the parties and the courts below treated those contracts as vertical agreements subject to rule-of-reason analysis. Those agreements also have a meaningful horizontal aspect, however, since they restrict the terms on which merchants may deal with non-Amex as well as Amex customers and effectively prevent price competition among competing credit-card networks. See pp. 13-15, *supra*.

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[5] The only district court that has applied the court of appeals' decision to a purportedly two-sided market concluded that "[t]he relevant market for purposes of antitrust analysis may not be two-sided even though the defendant operates a two-sided platform." *US Airways, Inc.* v. *Sabre Holding Corp.*, No. 11-cv-2725, 2017 WL 1064709, at *8 (S.D.N.Y. Mar. 21, 2017), appeal pending, No. 17-960 (2d Cir. docketed Apr. 5, 2017). That court upheld a jury's finding that the market at issue was one-sided, concluding that the court of appeals' decision in this case "does not invalidate the jury's finding of a one-sided market * * * in a different industry and with very different facts." *Id.* at *10.

The agreements therefore might roughly be analogized to contracts in which a manufacturer forbids retailers to charge more for the manufacturer's goods than for specified goods obtained from the manufacturer's competitors. To date, however, there is no meaningful body of precedent addressing the antitrust status of agreements of that character.

If the court of appeals adheres to the approach it followed here—and particularly if it reads the decision below broadly—this Court's intervention may be warranted in an appropriate future case. But the Court ordinarily awaits the development of a conflict among the lower courts before exercising its certiorari jurisdiction. At minimum, that course will allow the Second Circuit to clarify the scope and content of its holding. And if this Court's review is ultimately warranted, additional percolation in the lower courts may assist the Court in its application of general antitrust principles to two-sided platforms and to agreements of the sort at issue here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
PATRICIA A. BRINK
Director of Civil Enforcement
KRISTEN C. LIMARZI
ROBERT B. NICHOLSON
JAMES J. FREDRICKS
NICKOLAI G. LEVIN
Attorneys

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STATES OF OHIO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MONTANA, RHODE ISLAND, UTAH, AND VERMONT,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, AND AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MICHAEL DEWINE
Attorney General of Ohio
ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
MICHAEL HENDERSHOT
Chief Deputy Solicitor
HANNAH C. WILSON
M. RYAN HARMANIS
Deputy Solicitors
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@ohioattorneygeneral.gov

Counsel for Petitioner
State of Ohio

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This case concerns the anti-steering provisions that American Express ("Amex") imposes on its merchant customers. Amex's opposition does not dispute the district court's *factual* findings that these provisions (1) have raised the prices that the entire credit-card industry charges merchants, and (2) in turn, have raised the prices that merchants charge consumers. Pet. App. 207a-12a; Amex Br. 10 & n.1. Instead, this case presents a purely *legal* question: Do these horizontal pricing effects meet the Government's burden under the "rule of reason" to show anticompetitive harm, and shift to Amex the burden to prove procompetitive benefits? The district court found that they did, but the Second Circuit required the Government to prove more—that the price increases were not offset by "benefits to cardholders in the form of rewards and other services." Pet. App. 49a n.52.

The petition explained why the Court should grant review. *First*, the Court's guidance on the rule of reason is needed, and the decision below conflicts with the guidance that it has provided. *Second*, this case is important to the economy and the law. *Third*, the decision below conflicts with antitrust law's guiding light—enhancing consumer welfare. In response, while the United States calls review premature, it fully agrees that the decision below "seriously departed from sound antitrust principles," and that Amex's provisions will "thwart price competition in an important sector of the economy and inflate the retail prices paid by all consumers." U.S. Br. 9-10. Amex, by contrast, defends the decision below before calling for further percolation. Amex Br. 14-36. Neither rebuts the need for *immediate* review.

I. THE COURT SHOULD GRANT REVIEW *NOW* BECAUSE THE SECOND CIRCUIT RESOLVED AN IMPORTANT QUESTION IN A NOVEL, HARMFUL WAY

Amex and the United States request further percolation, highlighting the lack of a circuit split. The Court should grant review *now*, however, because: (1) this case is important to the economy and the law; (2) the Second Circuit's dominance in antitrust litigation involving the credit-card industry makes a specific split unlikely; (3) delay imposes real costs on consumers; and (4) the Second Circuit prematurely departed from this Court's traditional framework.

A. The Court often considers important antitrust issues without a conflict. It did not wait until another circuit confronted the NCAA's television plan for football games because of the issue's "major impact countrywide." *NCAA v. Bd. of Regents of the Univ. of Okla.*, 463 U.S. 1311, 1313 (1983) (White, J., in chambers); *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 88 (1984). It did not wait for another circuit to confront blanket licenses for copyrighted music "because of the importance of the issue[]." *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 7 (1979). It obviously could not wait for a split to reconsider its rule against resale price maintenance. *Leegin Creative Leather Prods., Inc. v. PSKS*, 551 U.S. 877, 885 (2007). And it even reviewed a local agreement among Indiana dentists, not to resolve a split, but to clarify "applicable principles of antitrust law." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 453 (1986).

As the petition explained (at 25-30), this case should be no different. The decision below signifi-

cantly affects the economy. That is shown by the diverse *amici* group, ranging from Nobel prize-winning economists to distinguished antitrust professors, from a merchant association to a consumer group. Retailers "are united here in the view that Amex's anti-steering rules inflict significant harm to their business and to the national economy." Retail Litig. Ctr. Br. 2. A consumer group, too, notes that, without review, consumers "will collectively pay *billions of dollars* in inflated retail prices and unfair cross subsidies." U.S. Pub. Interest Research Grp. Br. 3; *cf. Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051 (2006) (Scalia, J., concurring in denial of certiorari) (suggesting that financial stakes provided "strong factor in deciding whether to grant certiorari").

Even Amex concedes this case's *"economic* significance," but claims that the Court reviews only cases of "*legal* importance." Amex Br. 30. Yet "the importance of a case depends on how many other persons, apart from the actual litigants, will be affected by resolution (or nonresolution) of the questions presented." Stephen M. Shapiro et al., *Supreme Court Practice* 480 (10th ed. 2013). This case affects nearly every American.

Regardless, unlike the one-time settlement that Amex identifies (Amex Br. 29), the case also has *legal* importance. Antitrust Professors Br. 1-2. Any principles that the Court articulates about what a plaintiff must prove to establish anticompetitive harm would affect *every* rule-of-reason case. And, contrary to Amex's claim (Amex Br. 27), recent cases preferring that rule highlight the need for review. The Court's preference for the rule of reason has increased its importance, but the Court has bemoaned

that it "produces notoriously high litigation costs and unpredictable results." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015). The Court should take this case to provide greater predictability, given "the importance of clear rules in antitrust law." *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 452 (2009).

Amex also wrongly calls this case "fact-bound." Amex Br. 26-27, 33. Not so. This case offers a great vehicle for clarifying generally applicable antitrust principles because of its clean record. As Amex concedes (Amex Br. 10 & n.1), the Second Circuit did not dispute any *factual* findings, so the case would not require the Court to delve into issues subject to clear-error review. The Court instead need only decide the *legal* effect of those findings.

B. Waiting for a split also could delay review *indefinitely*. As *amici* explain, antitrust suits challenging practices of the credit-card industry have converged in the Second Circuit because of multidistrict-litigation rules. Retail Litig. Ctr. Br. 21-23; Discover Br. 18-19. Decisions from those cases and others bear this out. *E.g.*, *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223 (2d Cir. 2016), *cert. denied Photos Etc. Corp. v. Home Depot U.S.A., Inc.*, 137 S. Ct. 1374 (2017); *Italian Colors Rest. v. Am. Express Travel Related Servs. Co.*, 667 F.3d 204 (2d Cir. 2012), *rev'd Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96 (2d Cir. 2005); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003); *cf. In re Am. Express Anti-Steering Rules Antitrust Litig.*, No. 11-MD-2221 (E.D.N.Y.). Arbitration agreements further limit the

ability of this Court to resolve antitrust issues against that industry. *Italian Colors*, 133 S. Ct. at 2320 (Kagan, J., dissenting). In many respects, then, Amex's request here is like asking the Court to wait for a circuit conflict before reviewing a patent case from the Federal Circuit. *Cf. Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 836 (2015). But a regional circuit in New York should not have the final word on a practice that affects merchants and consumers from Utah to Rhode Island.

C. During that delay, Amex's provisions would permit inefficient cross-subsidies to permeate the economy, imposing real harm. As the petition noted (at 30-35), modern antitrust law seeks to enhance consumer welfare through allocative efficiency—i.e., "ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them." *Ind. Fed'n of Dentists*, 476 U.S. at 459. The anti-steering provisions impede that goal by barring merchants from signaling to cardholders the costs that different cards impose, making price unresponsive to "consumer preference." *NCAA*, 468 U.S. at 107. Retailers spread resulting higher costs to *all* consumers through higher retail prices. Pet. App. 210a-11a. Thus, Amex's "customers do not internalize the full cost of their payment choice," Pet. App. 195a, which "distort[s] competitive markets by steering consumers toward more costly and less efficient payment methods," Alan Frankel & Allan Shampine, *The Economic Effects of Interchange Fees*, 73 Antitrust L.J. 627, 672 (2006).

The costs from any delay could prove significant. "One study by the Federal Reserve Bank of Boston found that, 'on average, each cash buyer pays $149 to

card users and each card buyer receives $1,133 from cash users' in annual cross subsidies." U.S. Pub. Interest Research Grp. Br. 7 (citation omitted). This redistribution is regressive because lower-cost cash and debit customers "tend to have incomes or credit scores too low to qualify for rewards credit cards." Economists Br. 20.

Amex responds to this point in circular fashion in a footnote. It says that focusing on higher retail prices "'fails to take into account offsetting benefits to cardholders in the form of rewards and other services.'" Amex Br. 24 n.6 (quoting Pet. App. 49a n.52). But those rewards cannot *themselves* prove the lack of competitive harm. They are procompetitive only if they arise from Amex's efficiency, not from inefficient cross-subsidies. And the reason that Amex must use anti-steering provisions is to maintain the latter. Competition would lead cardholders to internalize the costs of their cards and decide whether the benefits exceed their *full* costs. That competition—"not Amex's obstruction" of it—should decide the optimal amount of cardholder rewards. Antitrust Professors Br. 19; Economists Br. 11.

Amex also claims that a concern with allocative efficiency represents a "guise" to apply quick-look standards to vertical restraints. Amex Br. 28-29. Not so. The rule of reason applies, so the Government used a seven-week trial to prove the *actual* effects of Amex's provisions on merchant fees. Indeed, Amex's reliance on this Court's vertical-restraint cases is ironic. These cases have recognized that vertical restrains can decrease *intrabrand* competition to increase interbrand competition. *Leegin*, 551 U.S. at 890. Here, however, Amex's restraints decrease

interbrand competition among credit-card networks. These cases have also recognized that vertical restraints can prohibit "free rides." *Id.* at 890-91. Here, however, Amex's restraints promote free rides by exacerbating cross-subsidies. In sum, this case warrants review whether one adheres to the Chicago School, the Harvard School, or a more Brandeisian view of antitrust. *Cf.* 1 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 112d (4th ed. 2013).

D. Lastly, Amex and the United States suggest that the Court should decline review because lower courts and economic literature have just begun debating "two-sided" platforms. Amex Br. 30-34; U.S. Br. 20-21. This has things backwards. For decades, the Court has used *one test* to define the market, asking whether another product is "reasonably interchangeable" with the product at issue. *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). It has done so even though two-sided platforms have been around for just as long. *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 610 (1953). Indeed, many [illegible]gular markets can be recharacterized as "two-sided." Economists Br. 6-7.

The Second Circuit's decision to favor a "novel and unprecedented approach" over the traditional market-definition test provides a reason for review, not a shield against scrutiny. *Id.* at 9. Antitrust cases do "not lightly assume that the economic realities underlying earlier decisions have changed, or that earlier judicial perceptions of those realities were in error." *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988). Instead, a change in law should be grounded in substantial experience showing that those standards do not fit business to-

day. *State Oil Co. v. Khan*, 522 U.S. 3, 20-22 (1997). *Leegin*, for example, overturned the ban on vertical price restraints only *after* decades of doctrinal developments. 551 U.S. at 889-904. Thus, any claim that a "different and new economic analysis is required in two-sided markets" should require "a rigorous and careful demonstration." Economists Br. 9. But the Second Circuit did not identify any consensus of scholarship and experience proving that an exception should exist to the traditional market-definition test for markets like the credit-card market. And because two-sided platforms have become more common, the decision below could "exempt[] [many] firms from effective antitrust scrutiny." Antitrust Professors Br. 22.

II. AMEX CANNOT RECONCILE THE DECISION BELOW WITH THIS COURT'S CASES

The petition explained that the Second Circuit's decision conflicts with this Court's cases by (1) departing from the traditional test for defining the relevant market, and (2) imposing on the Government the requirement to *dis*prove procompetitive benefits. Pet. 18-25. The United States agrees that the Second Circuit made these errors, U.S. Br. 10-19, as does a leading treatise, Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶ 562e, 565, 1505 (Supp. 2017). Amex's opposition fails to reconcile the decision below with the Court's cases on both points.

A. *Market Definition.* As the petition noted (19-24), Amex's cardholder services are not in the same market as its merchant services because merchants could not simply become cardholders in response to increased merchant fees. In response, Amex con-

cedes the *fact* that its merchant services and cardholder offerings are not reasonably interchangeable. Amex Br. 16. It instead opts for a new *legal* test, contending that its services to cardholders and merchants—together—qualify as "*part of the same product*" because services to one are *useless* without services to the other. *Id.* That is analogous to saying that tires and brakes should be treated as part of the same product—in the same market for finished automobiles—because the two component parts are useless without the other (and many others).

Amex's argument conflicts with *Eastman Kodak Co. v. Image Technology Services*, 504 U.S. 451 (1992), which held that the *servicing* of Kodak photocopiers could qualify as a separate product in a separate market from the *replacement parts* for Kodak photocopiers. *Id.* at 462-63, 481-82. Amex responds that these services and parts were separate products because they could be "sold separately and at different times." Amex Br. 17. The same is true of Amex's services; it provides credit cards to (and contracts with) cardholders "separately and at different times" from its contracts with merchants. Indeed, Visa and Mastercard's distinct open-loop systems—with *separate* issuers and acquirers—show that entities can sell a "component" independent of the "final" credit-card transaction. Pet. App. 13a-14a. Despite allegedly selling the left shoe without the right (Amex Br. 16), issuers of Visa cards manage to stay in business. In short, as the district court noted, "each constituent product market in this industry is distinct, involving different sets of rivals and the sale of separate, though interrelated, products and services to separate groups of consumers." Pet. App. 119a.

Times-Picayune also recognized that "interdependent markets" should be treated separately under the antitrust laws. 345 U.S. at 610. Amex counters that the Court in that case "simply held that the defendant lacked market power over *advertising*." Amex Br. 17 (emphasis added). This statement admits that the Court analyzed one side of a two-sided platform (advertising) as a separate market from the other (readership). The Court did not ask whether the defendant had market power over the entire newspaper platform that brings together advertisers and readers. Amex next distinguishes credit cards from newspapers, noting that the former unites a cardholder and a merchant on a transaction-by-transaction basis whereas the latter unites readers and advertisers generally. *Id.* at 18. Amex fails to explain why this factual distinction concerning the degree of interdependence matters for the legal question about defining the relevant market. It should not. In both the newspaper and credit-card contexts, "*competition* should choose the optimal mix of revenue as between the two sides, an issue obfuscated by the [Second Circuit's] incorrect finding that these two elements of revenue were within the same antitrust market." Areeda & Hovenkamp, *supra* ¶ 562e.

B. *Burden Shifting.* As the petition noted (at 24-25), the decision below also conflicts with *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013). The Second Circuit's market definition required the Government to prove *not only* that Amex's anti-steering provisions caused harm to price competition in the merchant side of the credit-card platform, *but also* that this harm was not "offset" by procompetitive benefits on the cardholder side. Yet *Actavis* identified the *de-*

fendant as the entity that must prove the "legitimate justifications" for a restraint. 133 S. Ct. at 2236.

In response, Amex makes an irrelevant point and a mistaken one. As for the irrelevant point, Amex notes that the petition did not challenge the Second Circuit's holding regarding the *indirect* method of proving anticompetitive harm—i.e., showing that the defendant has market power based on its market share (or other circumstantial evidence). Amex Br. 20-21. Here, however, the Government proved market power *directly* by showing actual anticompetitive effects (reduced price competition and higher prices). The district court found—and the Second Circuit did not deny—that Amex's provisions *increased* the prices that the *entire* credit-card industry charged merchants. Pet. App. 192a-93a, 207a-10a. "[T]he purpose of the inquiries into market definition and market power is to determine whether an arrangement has the *potential* for genuine adverse effects on competition." *Ind. Fed'n of Dentists*, 476 U.S. at 460 (emphasis added). Such inquiries are unnecessary when a plaintiff proves "'*actual* detrimental effects.'" *Id.* at 460-61 (emphasis added and citation omitted).

As for the mistaken point, Amex argues that the Government failed to prove *actual* anticompetitive harm—so as to transfer the burden to Amex to offer legitimate justifications—because the Government's reliance on increased merchant prices did not consider the cardholder side of the platform, including cardholder rewards. Amex Br. 22-25. Yet, as the United States noted, the district court found that total "net" prices were higher even accounting for the rewards. U.S. Br. 18 n.4 (citing Pet. App. 209a). Regardless, this claim doubles down on Amex's mistak-

en market definition. Instead, the Government satisfied its "prima facie case" by showing the credit-card industry's reduced price competition for *merchants*. Areeda & Hovenkamp, *supra* ¶ 1505. Amex, "being the author of the restraints, is in a better position to explain why they are profitable and in consumers' best interests." *Id.* For the reasons noted above, *supra* Part I.C, Amex's conclusory reliance on rewards—without more—does not provide a legitimate justification for the restraint.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
MICHAEL HENDERSHOT
Chief Deputy Solicitor
HANNAH C. WILSON
M. RYAN HARMANIS
Deputy Solicitors
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@
ohioattorneygeneral.gov

Counsel for Petitioner
State of Ohio

SEPTEMBER 2017

ADDITIONAL COUNSEL

GEORGE JEPSEN
Attorney General
State of Connecticut

LAWRENCE G. WASDEN
Attorney General
State of Idaho

LISA MADIGAN
Attorney General
State of Illinois

TOM MILLER
Attorney General
State of Iowa

BRIAN E. FROSH
Attorney General
State of Maryland

BILL SCHUETTE
Attorney General
State of Michigan

TIM FOX
Attorney General
State of Montana

PETER KILMARTIN
Attorney General
State of Rhode Island

SEAN D. REYES
Attorney General
State of Utah

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont

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STATES OF OHIO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MONTANA, RHODE ISLAND, UTAH, AND VERMONT,
Petitioners,

v.

AMERICAN EXPRESS COMPANY, AND AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICI CURIAE* AHOLD U.S.A., INC.; ALBERTSONS LLC; BI-LO LLC; CVS PHARMACY, INC.; THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC.; H.E. BUTT GROCERY CO.; HY-VEE, INC.; THE KROGER CO.; MEIJER, INC.; PUBLIX SUPER MARKETS, INC.; RITE AID CORPORATION; SAFEWAY INC.; SUPERVALU, INC.; AND WALGREEN CO. IN SUPPORT OF PETITIONERS

RICHARD ALAN ARNOLD
Counsel of Record
KENNY NACHWALTER, P.A.
1441 Brickell Avenue Ste. 1100
Miami, Florida 33131
(305) 373-1000
rarnold@knpa.com

Counsel for Amici Curiae

July 6, 2017

[Additional Counsel Listed On Signature Page]

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Ben K. Grunwald, *Suboptimal Social Science and Judicial Precedent*, 161 U. Pa. L. Rev. 1409 (2013) 24
Benjamin Klein et al., *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 Antitrust L.J. 571 (2006)..... 8

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Rules

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INTEREST OF *AMICI CURIAE*

Amici are some of the largest supermarket and drugstore chains in the United States. All of the *Amici* purchase Amex merchant services.[1] Credit card fees are among the largest and fastest-growing expenses for *Amici*. The source of those high fees is the total lack of horizontal price competition for credit card merchant services.

SUMMARY OF ARGUMENT

While this case presents important issues of antitrust jurisprudence warranting the States' appeal, it also presents a critical issue as to the fundamental responsibility of appellate courts with respect to the consideration of extra-record factual assertions and economic assumptions introduced for the first time on appeal. In this antitrust case of national import affecting millions of merchants and consumers, and encompassing billions of transactions totaling trillions of dollars, the Second Circuit panel ignored the findings of fact in the district court's 150-page opinion without determining that they were clearly erroneous.

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[1] Counsel for *Amici* provided counsel for the parties timely notice of intent to file this brief, and the parties have consented. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* or their counsel made a monetary contribution to its preparation or submission.

Instead, as demonstrated below, the appellate panel relied almost exclusively on factual assertions from an amicus brief and secondary sources funded by—and in some instances actually written and edited by—the payment industry. These assertions were in direct contradiction to the facts as found by the district court after 24 days of trial.

Amici are among the millions of U.S. merchants who, as found by the district court, "cannot inject price competition into the network services industry by encouraging their customers to use their lowest cost supplier, as they can in other aspects of their business." Pet. App. 198a. "Amex's NDPs deny its competitors the ability to recognize a 'competitive reward' for offering merchants lower swipe fees, and thereby suppress an important avenue of horizontal interbrand price competition." *Id.* 197a. The Amex restraints even prevent new entrants from competing through a differentiated, low-merchant fee business model. *Id.* 204a-206a.

On appeal, the appellate panel did **not** find erroneous or even address the district court's findings on the effect of the Amex rules on competition for merchant services. It only held that these findings did not show an anticompetitive effect because merchants and cardholders are each consumers of services on Amex's two-sided platform. Pet. App. 49a-50a. Even under the panel's logic, this means that a firm can eliminate horizontal price competition for services to millions of its customers without producing any anticompetitive effects. The panel's opinion is the first

antitrust case in history to so hold. Further, it conflicts with cases involving two-sided platforms—like newspapers, radios, and telephone services—where courts have found an anticompetitive effect based only on restraints in the relevant antitrust market on one side of the platform.[2]

As Professor Hovenkamp explains in his just-released supplement to his treatise, "the court failed to see...that under antitrust policy *competition* should choose the optimal mix of revenue as between the two sides, an issue obfuscated by the incorrect finding that these two elements of revenue were within the same antitrust market." P. Areeda & H. Hovenkamp, Antitrust Law § 562e (Supp. 2017). Professor Hovenkamp surmises that the appellate panel "was apparently misled by the fact that Amex obtained revenue from sources, merchant fees and consumers, but the fact that a firm obtains its profits from two different, non-substitutable groups does not serve to place the two groups into the same market." *Id.* § 565.

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[2] *See Times Picayune Publ'g Co. v. United States*, 345 U.S. 594 (1953) (newspaper's restraint affecting advertisers, not readers, had anticompetitive effect); *Lorain Journal Co. v. United States*, 342 U.S. 143, 152-53 (1951) (same); *Telecor Commc'ns, Inc. v. S.W. Bell Tel. Co.*, 305 F.3d 1124, 1134 (10th Cir. 2002) (telephone company's restraint affecting pay phone operators, but not telephone users, had anticompetitive effect); *United States v. Microsoft Corp.*, 253 F.3d 34, 60-62, 65-72 (D.C. Cir. 2001) (analysis of Microsoft's monopolization of operating system market focused on anticompetitive effects with respect to software developers).

Amici believe that they have unique insights by virtue of their prior litigation against Visa and MasterCard and their parallel litigation against Amex—which was filed years before the Government's case but consolidated with it for purposes of discovery—to share with this Court how the appellate panel below "reached [its] troubling conclusion." *Id.* § 1505.

This brief details the lengths to which the appellate panel relied upon non-record sources (Part I), establishes how such reliance contravenes the standard of review and adversarial system (Part II), and then reveals the undisclosed involvement of and links between Amex (and the payment industry in general) with the amicus brief and secondary sources relied on by the panel (Part III) to demonstrate why this case warrants review.

ARGUMENT

I. THE APPELLATE COURT PANEL WAS LED ASTRAY BY INCORRECT FACTUAL ASSERTIONS AND BIASED ECONOMIC THEORY FROM AN AMICUS BRIEF AND OTHER SECONDARY SOURCES.

A review of the appellate court proceedings reveals how the panel was "apparently misled," to borrow Professor Hovenkamp's characterization. It also demonstrates why review is warranted by this Court to address the increasing frequency of the breakdown of the adversarial system in the

intermediate appellate courts. This case shows how reliance on extra-record materials presented for the first time on appeal from untested sources containing unknown biases can result in extraordinary conclusions with far-reaching implications for both antitrust jurisprudence and $5 trillion of the U.S. economy.

The record in this case was well-developed in the district court. The pre-trial proceedings involved millions of pages of documents and over 200 depositions that filled over 40,000 pages of testimony. Amex identified five testifying experts whose deposition testimony filled over 3,500 pages. The Government identified five of its own experts whose deposition testimony filled over 2,600 pages. At trial, the district court heard live testimony from four of the experts and more than 30 fact witnesses while admitting over 500 exhibits.

Pursuant to Fed. R. App. P. 10(a), these materials constituted the record on appeal. "The importance of Rule 10(a)'s definition lies largely in the fact that, as a general matter, the court of appeals will not consider matter that is not part of the record on appeal." 16A Wright & Miller, Federal Practice & Procedure § 3956.1 (4th ed.). Rather than look to the factual record, the appellate court panel relied extensively on factual assertions and economic assumptions contained in an amicus brief and eight secondary sources that had not been subjected to the adversarial process. While amicus briefs and secondary sources can serve important functions in

American jurisprudence, the process in the appellate court below demonstrates what happens when such materials fail to disclose biases and manipulate the very courts that turn to such materials in their search for truth.

For several foundational factual assumptions on which the appellate court panel based its ultimate—and unprecedented—legal conclusions, the panel tracked language directly from the amicus brief submitted by Robert Willig and three other individuals (the "Willig brief"):

- *Compare* Willig brief at 9 ("increases in merchant discounts are a concomitant of a successful investment in creating output and value"), ***with*** Pet. App. 43a ("increases in merchant fees are a concomitant of a successful investment in creating output and value");

- *Compare* Willig brief at 7 ("[t]here is no meaningful economic difference between 'dropping American Express'...and a decision not to accept American Express in the first place"), ***with*** Pet. App. 46a-47a ("[t]here is no meaningful economic difference between 'dropping American Express'...and a decision not to accept American Express in the first place");

- *Compare* Willig brief at 7 ("A merchant chooses whether or not to accept a card based on its assessment of the costs and benefits of doing so."), ***with*** Pet. App. 47a ("A merchant chooses whether or not to accept a particular credit card based on an

individualized assessment of the various costs and benefits associated with accepting that card.");

- *Compare* Willig brief at 8 ("Cardholder insistence on using American Express's cards is a part of what makes accepting American Express's cards (and paying the merchant discount) a worthwhile business for the merchants that accept them."), *with* Pet. App. 45a-46a ("Cardholder insistence is exactly what makes it worthwhile for merchants to accept Amex cards—and thus cardholder insistence is exactly what makes it worthwhile for merchants to pay the relatively high fees that Amex charges.");

- *Compare* Willig brief at 9 ("When demand for American Express's product expands on the cardholder side, value also expands on the merchant side...."), *with* Pet. App. 43a ("Increased demand on the cardholder side of the platform expands value on the merchant side");

- *Compare* Willig brief at 7-8 ("[C]ardholder insistence...does not indicate market power but instead indicates the competitive benefits on the cardholder side of the two-sided market and the concomitant resulting competitive benefits to merchants that accept American Express cards."), *with* Pet. App. 45a ("Cardholder insistence results not from market power, but instead from competitive benefits on the cardholder side of the platform and the concomitant competitive benefits to merchants who choose to accept Amex cards.");

- *Compare* Willig brief at 12 ("Given a reduction in merchant revenue, American Express's optimal level of cardholder benefits would decrease, which in turn would reduce the intensity of competition among credit card networks on the cardholder side of the market."), *with* Pet. App. 50a ("A reduction in revenue that Amex earns from merchant fees may decrease the optimal level of cardholder benefits, which in turn may reduce the intensity of competition among payment card networks on the cardholder side of the market."); and

- *Compare* Willig brief at 13 ("considering both the effects on network services to merchants and the effects on credit card services to cardholders"), *with* Pet. App. 49a ("consider the two-sided net price accounting for the effects of the NDPs on both merchants and cardholders").

Likewise, the appellate court panel relied on eight secondary sources for many of its other foundational factual findings and economic suppositions that gave rise to its legal conclusions. For example, the panel opinion relied extensively upon a 2006 article by Benjamin Klein, Andres V. Lerner, Kevin M. Murphy, and Lacey L. Plache entitled *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 Antitrust L.J. 571, 574 (2006) (the "Klein article"). *See* Pet. App. 8a n.5, 9a n.9, 14a n.24, 15a n.30, and 31a n.43. The panel opinion cited the Klein article for the proposition that merchant discounting or surcharging is the equivalent of merchants not purchasing Amex's

merchant services. It also cited the Klein article for the contention that using such price signals to steer cardholders to lower-cost forms of payment imposes a significant cost on the payment system's brand and an "externality on the entire payment card system," which would "eventually lead some merchants to drop acceptance of the payment system's cards." *Id.* 31a n. 43.[3]

These are but a sampling of the many factual assumptions contained in the appellate court panel decision, the bases for which are not found in the record but instead supplied by either the Willig brief or the eight secondary sources. Unfortunately, many of the factual and economic assumptions from these sources either were found to be untrue by the district court in its 150-page memorandum decision or are otherwise unsupported by the actual record.

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[3] In addition, and more generally, the appellate court panel cited the Klein article to support the statement that "legal and economic scholars often view *vertical* restraints as having pro-competitive effects." Pet. App. 31a (italics added). Yet, the district court specifically found that Amex's restraint had the anticompetitive effect of preventing *horizontal* price competition among credit card networks. *Id.* 194a-203a.

II. THE APPELLATE COURT PANEL'S DISREGARD OF THE FACTUAL RECORD IN FAVOR OF THE WILLIG BRIEF AND SECONDARY SOURCES CONTRAVENES THE STANDARD OF REVIEW AND CIRCUMVENTS THE ADVERSARIAL PROCESS.

This Court has emphasized that appellate courts must not "decide factual issues de novo" and that this "is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Anderson v. City of Bessemer, N.C.*, 470 U.S. 564, 574 (1985) ("The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise."); *see also Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 836–37 (2015) ("[W]hen reviewing the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo."); *Mickens v. Taylor*, 535 U.S. 162, 177 (2002) (Kennedy, J., concurring) ("Our role is to defer to the District Court's factual findings unless we can conclude they are clearly erroneous.").[4] A district court's "[f]indings

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[4] Likewise, this Court has held that "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991).

of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous...." Fed. R. Civ. P. 52(a)(6).

Importantly, this clearly erroneous standard applies regardless of the nature of the fact, whether it be ultimate or subsidiary, or grounded in economic theory or actual observation:

> Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982). The "considerations underlying Rule 52(a)" include "the demands of judicial efficiency, the expertise developed by trial judges, and the importance of first hand observation." *Maine v. Taylor*, 477 U.S. 131, 145 (1986).

This is especially true for expert testimony, which can be at the heart of many antitrust cases. FRE 702 "imposes a special obligation" upon a trial judge to ensure that "all expert testimony" is both

relevant and reliable. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). "[T]he trial judge must determine at the outset...whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993). Even the dissent in *Daubert* recognized that "scientific knowledge, scientific method, scientific validity, and peer review" are "matters far afield from the expertise of judges." *Id.* at 598–99 (Rehnquist, J., dissenting). Yet, that is exactly what the appellate court panel did by adopting the untested expert opinions expressed in the Willig brief to the exclusion of the actual expert testimony vetted in the trial court.

By relying on extra-judicial (and incorrect) factual assertions and economic theory on two-sided markets—including theories unraised and facts not presented by Amex—the appellate court panel cast aside the very essence of our "party-directed adversarial system." *United States v. Ackerman*, 831 F.3d 1292, 1299 (10th Cir. 2016) (Gorsuch, J.).[5] "For two centuries past, the policy of the Anglo–American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the

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[5] Federal judges are, of course, permitted to obtain facts independently (without admission into the record) if they are "not subject to reasonable dispute." Fed. R. Evid. 201(b). These facts must be "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Id.*

law." *Perry v. Leeke*, 488 U.S. 272, 283 n.7 (1989). This Court has extolled cross-examination as "the greatest legal engine ever invented for the discovery of truth." *White v. Illinois*, 502 U.S. 346, 356 (1992). "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405 (1965). The appellate court panel's acceptance of new facts and theory "on appeal in order to reverse the trial court marks the greatest affront to the policy restrictions on appellate review." 21B Wright & Miller, Federal Practice & Procedure § 5110.1 (2d ed.).

The near-exclusive reliance by the appellate court panel on the Willig brief and eight secondary sources—to the exclusion of the actual factual record and prior antitrust jurisprudence—constitutes reason itself for this Court to grant certiorari.

III. THIS CASE PRESENTS AN IDEAL CANDIDATE TO ADDRESS THE ISSUE OF APPELLATE COURT FACT-FINDING IN LIGHT OF THE UNDISCLOSED BIASES AND FINANCIAL CONNECTIONS IN THE SOURCES EXTENSIVELY RELIED ON BY THE APPELLATE COURT PANEL.

The undisclosed biases in the Willing brief and secondary sources demonstrate the dangers of

circumventing the adversarial system. Both the Willig brief and the secondary sources *all* included authors that have been paid by or otherwise connected to Amex or the payment industry.[6]

For example, undisclosed in the Willig brief and apparently unbeknownst to the appellate court panel, Willig has had historical financial ties to and involvement with Amex. He has been paid by Amex for his testimony and services.[7] In fact, Willig's prior paid expert work for Amex was used below by Amex's testifying expert, with whom Willig works and has co-published approximately twenty times.[8] Willig has

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[6] Such connection to a party would normally disqualify such sources from any reliance by this Court. *See, e.g., Exxon Shipping Co. v. Baker*, 554 U.S. 471, 501 n.17 (2008) ("Because this research was funded in part by [a party], we decline to rely on it.").

[7] *See, e.g.*, Newsletter by Compass Lexecon, LLC, *Historic Settlement in American Express v. Visa/MasterCard Antitrust Suit*, July 23, 2008 (available at https://goo.gl/UrTN4A) (last visited June 28, 2017) (promoting Compass Lexecon's team of experts, including Willig, for helping to produce a "historic final settlement" on behalf of its client Amex). The fact that *Amici* must introduce this newsletter (and other materials cited in the footnotes below) through citations to websites underscores the problem: the Willig brief and the secondary sources were not a part of the trial-court record, so the parties did not have the opportunity to present this or other proof through the adversarial process.

[8] *See* Amex's Pretrial Memorandum at n. 28, Dkt. No. 514 (available at http://goo.gl/QpTWiH) (last visited June 28, 2017) (stating that data used by Amex's expert in this litigation, Janusz

also been retained by Amex in other capacities, including to author a paper for the Federal Reserve Bank on Amex's behalf.[9] And Willig was—and is currently—employed by the very economic consulting firm that was retained by Amex below to provide expert testimony and even issued a press release taking credit for the appellate court panel's decision.[10] None of these connections were disclosed to the Second Circuit.[11]

Ordover, "was first used by Professor Willig in his analysis in the Exclusionary Rules case against Visa and MasterCard"); Curriculum Vitae of Janusz Ordover (available for download at https://goo.gl/UaJ4qW) (last visited June 28, 2017) (citing twenty-four publications that Ordover co-authored with Willig).

[9] *See* Robert D. Willig, *Avoiding Misapplication to American Express of the Proposed Debit Card Interchange Fee Rules: An Economic Assessment*, Feb. 22, 2011 (available at https://goo.gl/p5NREH) (last visited June 28, 2017) (stating on the cover page that the article was "Prepared at the Request of Counsel for American Express Company").

[10] Press Release by Compass Lexecon, LLC, *U.S. Second Circuit Court of Appeals finds in favor of American Express in U.S. et al. v. American Express Co. et al.*, Sept. 26, 2016 (available at https://goo.gl/hLfmvo) (last visited June 28, 2017).

[11] The lack of disclosure in the Willig brief may be compared to another economist amicus brief filed in the Second Circuit by Dr. Alan Frankel, who spent several pages disclosing his past work, research, testimony, and interests related to payment card litigation. Of course, despite these disclosures, it would have been no more correct for the panel to rely on Dr. Frankel for extra-record factual assertions than the Willig brief because the panel was not the fact finder. That was the province of the district court based on the record before it, and it ruled for the Government as

This appeal illustrates why "it is important to consider what is lost when the Court chooses to move away from the adjudicative model." Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs A New Deal*, 89 Tex. L. Rev. 1247, 1268 (2011). As one commentator notes:

> Without being able to ask of an amicus "what's it to you?," the Court may not be able to discount amici's economic arguments according to how closely they serve their author's self-interest. It is true that the disclosure statement and the convention of declaring support for one side or the other give the Justices a hint as to a party's interest in a suit. But without a cognizable legal interest at stake, an amicus's bias may not be clear even from these disclosures.
>
> This is especially true in the context of amici such as antitrust and economics professors.

Id. "Although it is perhaps unsurprising that courts sometimes rely on extra-record facts, it is surprising that the phenomenon has received so little attention, given that it results in important factual disputes being decided by appellate courts, without the benefit

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to the essential economic facts in the case after considering all of the evidence and expert testimony. As noted, the panel decision did not disturb the district court's fact findings.

of meaningful adversarial testing." Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 Duke L.J. 1, 8 (2011) (hereinafter, "The Adversarial Myth"). The reality is that the Willig brief was not an amicus brief at all. "The term 'amicus curiae' means friend of the court, not friend of a party." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J.).

Likewise, of the eight secondary sources relied upon by the appellate court panel,[12] *all* were written by at least one author with financial connections to the payment industry. Five of the secondary sources were authored by David Evans. For over thirty (30) years, Evans has repeatedly served as a paid expert for Visa, "for whom he has made public submissions and appearances."[13] Evans has testified on behalf of Visa, MasterCard, and other payment card industry clients both in litigation and numerous other proceedings.

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[12] The panel decision briefly mentions a ninth article by Lapo Filistrucchi, *et al.*, in a single instance at the beginning of its opinion (Pet. App. 7a n.3) when it first references the term "two-sided" market but never relies on the article subsequently and never draws any factual assumptions about the payment card industry from the article.

[13] *See* Web Biography of David S. Evans for Global Economics Group (available at https://goo.gl/14FccP) (last visited June 28, 2017); *see also* David S. Evans & Richard L. Schmalensee, *Joint Venture Membership: Visa and Discover Card (1993)* (available at https://goo.gl/qWcQwX) (last visited June 28, 2017) (acknowledging that Evans was "retained by Visa, USA in this litigation").

Two of Evans' articles were co-authored by Richard Schmalensee, who has also repeatedly served as a paid expert for Visa.[14] Numerous courts have referenced Schmalensee as a paid Visa expert.[15] As one court recited, "Schmalensee and Evans built an ongoing relationship with Visa that resulted in [the expert consulting firm] NERA performing work for Visa in at least 18 projects between 1995 and 2004, resulting in NERA billings to Visa of over $14.5 million....Evans served as the NERA director and group leader for all of them." *Nat'l Econ. Research Assocs., Inc. v. Evans*, No. CIV.A. 04-2618-BLS1, 2008 WL 4352600 at *1 (Mass. Super. Ct. Sept. 10, 2008). Schmalensee has also testified on behalf of other payment industry members.[16]

Even the pioneering and well-respected Jean-Charles Rochet and Jean Tirole, who authored the

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14 *See* Curriculum Vitae of Richard Schmalensee (available at https://goo.gl/NGnKzW) (last visited June 28, 2017) (detailing numerous instances of testifying and submitting expert reports for Visa dating back to the early 1990s).

15 *See, e.g., United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 331 (S.D.N.Y. 2001); *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 74 (E.D.N.Y. 2000); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 131 (2d Cir. 2001); *SCFC ILC, Inc. v. Visa U.S.A., Inc.*, 819 F. Supp. 956, 984 (D. Utah 1993); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 968 n.13 (10th Cir. 1994); *United States v. Visa U.S.A., Inc.*, 183 F. Supp. 2d 613, 616 (S.D.N.Y. 2001).

16 *See, e.g., Capital One Fin. Corp. v. Comm'r*, 133 T.C. 136 (T.C. 2009).

2003 and 2006 articles cited by the appellate court panel, have received funding from the payment industry and/or also worked with Evans and Schmalensee.[17]

The last of the eight secondary sources, the Klein article, deserves special attention, and not just because both Klein and co-author Lerner have repeatedly served as paid consulting and testifying experts for Visa and other members of the payment industry.[18] The Klein article provides an inside look

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17 *See, e.g.*, David S. Evans, Jean-Charles Rochet & Richard Schmalensee, *The European Commission's Interim Report on Payment Cards: Some Comments and Suggestions*, June 21, 2006 (available at https://goo.gl/HFq3fM) (last visited June 28, 2017) (disclosing funding for paper while also "consult[ing] for other members of the payment card industry"); Hélène Bourguignon, Renato Gomes & Jean Tirole, *Shrouded Transaction Costs*, Sept. 2014 (available at https://goo.gl/aAMNCy) (last visited June 28, 2017) (disclosing membership in IDEI, which receives financial support from payment industry member); Curriculum Vitae of Jean Tirole (available at https://goo.gl/68ueCG) (last visited June 28, 2017) (listing co-publications with Schmalensee); David S. Evans & Richard Schmalensee, PAYING WITH PLASTIC: THE DIGITAL REVOLUTION IN BUYING AND BORROWING (acknowledging contributions from Rochet and Tirole along with "several employees of MasterCard and Visa" and "financial support" from Visa).

18 *See, e.g.*, Curriculum Vitae of Benjamin Klein (available at https://goo.gl/StVuUa) (last visited June 28, 2017) (noting numerous paid expert reports and testimony on behalf of Visa); Curriculum Vitae of Andrew V. Lerner (available at https://goo.gl/5S3ZES) (last visited June 28, 2017) (detailing numerous paid expert engagements on behalf of Visa).

into how much of a guiding hand the payment industry has had in the economic literature in this area. By virtue of their involvement in the parallel antitrust litigation involving Visa and MasterCard, *Amici* discovered that Klein sent drafts of the article to Visa's inside counsel, who in turn sent the draft to Visa executives for comment, explaining that "[b]ecause of our long time relationship with him (and because we are subsidizing this paper), he [Klein] has been kind enough to share a draft with us." Visa executives provided handwritten or track change edits to the article.[19] Klein also sent the draft article to Visa's outside lawyers, who also responded with edits and deletions.[20] Furthermore, Klein's deposition

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[19] The track changes from Visa included edits, comments, and questions (i) seeking to bolster the stated rationales for the honor all cards rule; (ii) asking for "any thoughts about how we could debate whether this 'usage externality' even exists? I don't see a way around it, but was hoping someone else might"; and (iii) suggesting "why state it this way" in response to wording in the original draft explaining "even if a payment system may have some market power." Additional handwritten notes from Visa included underlining for emphasis, margin comments, edits, and the following comment: "'usage externality' – lets expand – I'd like to argue that it is debatable whether it exists."

[20] The edits and feedback included comments (i) emphasizing the importance of fixed interchange fees and the impact of surcharging on a two-sided market; (ii) articulating the two-sided issue and network effects; (iii) deleting a footnote regarding demand pricing, elasticity and network effects; (iv) criticizing and arguing against a statement in the text that "American Express and Diners Club unregulated Australian merchant discount rates fell by 13 basis points as a competitive reaction to the lower regulated Visa and MasterCard interchange

testimony established that but for Visa having "paid for some of the research assistants and some of [co-authors] Mr. Lerner and Ms. Plache's time," Klein would have "turned down the job of writing this article."

Visa's involvement is nowhere disclosed in the Klein article, leaving the reader (and the appellate court panel that relied on the article) in the dark as to Visa's role in the published version. Indeed, the paper trail contained in the drafts reflect an initial effort to disclose Visa's role only for it to be deleted. The January 2005 draft included the disclosure: "We are indebted to [Visa's outside litigation counsel],[21] [Visa's inside counsel], and [Visa's antitrust counsel]...for their helpful comments." It also included the disclaimer: "The opinions expressed in this paper are not necessarily the opinions of Visa U.S.A. Inc." Remarkably, the final version of the article *deleted the reference to Visa's involvement in its entirety* and stated only that the "authors have served at various times as consultants to Visa U.S.A. Inc."

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fees"; (v) asking "can we suggest here" an explanation for the networks' market-share shifts in Australia; (vi) stating "we don't want to leave an impression that merchants pay the costs of rewards programs"; (vii) commenting on higher interchange fees and market power; (viii) discussing merchant surcharging in Australia; and (ix) making suggestions to address cross subsidization and externalities issues.

[21] We have omitted the names.

This case presents an opportunity for the entire Court to declare what many individual Justices have separately lamented: appellate courts are "an inappropriate place to develop the key facts in a case." *Sykes v. United States*, 564 U.S. 1, 31 (2011) (Scalia, J., dissenting) (writing that appellate courts should leave "important factual questions to district courts and juries aided by expert witnesses and the procedural protections of discovery"); *see also Kansas v. Hendricks*, 521 U.S. 346, 391–92 (1997) (Breyer, J., dissenting) ("The prohibition on facts found outside the record is designed to ensure the reliability of the evidence before the Court."); *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 472 (2001) (Thomas, J., dissenting) ("[T]he record evidence that the parties have developed" should be both "more convincing" and "more relevant" than "an amicus brief.").

Although the practice of extra-record appellate factfinding is not unique to this case, this appeal provides an ideal vehicle for it to be addressed by this Court, which as a body has never "answered the more fundamental question of why it is even appropriate for the Court to look to [amicus] briefs—presented by nonparties, after all—for factual claims." *The Adversarial Myth*, 61 Duke L.J at 9; *cf.* Richard B. Cappalli, *Bringing Internet Information to Court: Of "Legislative Facts,"* 75 Temp. L. Rev. 99, 103 (2002) ("No rules circumscribe how judges may receive legislative facts, it being a matter of their absolute discretion whether and how to consult them.");

Edward K. Cheng, *Independent Judicial Research in the* Daubert *Age*, 56 Duke L.J. 1263, 1290 (2007) ("Judicial notice of legislative facts ... is basically unregulated.").

To paraphrase Judge Friendly's warning from forty years ago: "if a court wishes to rely on evidence of the type illustrated by [the Willig brief or the eight secondary sources], it must give the [opposing party] a fair opportunity to controvert this evidence." Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. Miami L. Rev. 21, 39 (1978). "No such opportunity is afforded when the materials are first presented in brief to the [appellate court] because of the time and space constraints imposed by the Court's rules with respect to briefs and argument." *Id.*; *see also* Carl A. Auerbach, *Legislative Facts in* Grutter v. Bollinger, 45 San Diego L. Rev. 33, 37–38 (2008) ("Judge Friendly concluded, whenever a court intends to take judicial notice of data outside the record..., it should, as a matter of fairness and to prevent egregious error, submit the data to the parties for examination, cross-examination, and rebuttal.").

Amicus briefs and other secondary sources can and do serve important roles in our judicial system. However, the system is predicated upon disclosure and honesty. The appellate court panel presumably thought it was relying on unbiased sources and vetted economic theory; in so doing, it disregarded Judge

Friendly's warning, bearing out the inherent dangers of circumventing the adversarial process.[22]

The appellate court panel's reliance on the Willig brief and the eight secondary sources presented, "at best, a limited and ad hoc opportunity for the presentation of adversarial ideas, not the structured opportunity for give-and-take presented by the party-centered adversarial system." *The Adversarial Myth*, 61 Duke L.J. at 60-61; *see also id.* at 9 ("[I]t is problematic when such 'facts' are 'found' by ad hoc

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[22] *See generally The Adversarial Myth*, 61 Duke L.J. at 5 (lamenting that "page limitations on briefs, time constraints on oral argument, and the general opacity of the appellate process may prevent thorough adversarial testing of the factual claims presented in amicus briefs"); Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 Va. L. Rev. 1255, 1292 (2012) (explaining danger of "the unnoticed introduction of bias that occurs when factual sources are not tested by the adversary system" but instead introduced "late in litigation" in appellate briefs). At the very least, the appellate court panel should not have relied upon extra-record materials without knowing the background of the authors and the bias inherent in the materials. *See, e.g.*, Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. Rev. 91, 157 (1993) ("We would require more detailed disclosures when social science is submitted by amici. Information should be provided to the Court about the qualifications of the principal investigators, the funding sources for the studies, and possible conflicts-of-interest."); Ben K. Grunwald, *Suboptimal Social Science and Judicial Precedent*, 161 U. Pa. L. Rev. 1409, 1418 (2013) (recommending that "courts rely upon social science research that has 'survived the critical review of the scientific community,' and that is based upon valid methodology, generalizable to the case at hand, and confirmed by a larger body of research").

methods without the benefit of rigorous testing and then provide the basis for consequential legal decisions."). The appellate panel was "misled" by biased, extra-record sources of information, resulting in the court substituting facts found by the district court with untested factual assertions outside the record. This case presents an ideal vehicle for this Court to address not only the underlying issues of antitrust jurisprudence, but also the inherent dangers of appellate court extra-record fact-finding.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: July 6, 2017

Respectfully submitted,

Richard Alan Arnold
Counsel of Record
KENNY NACHWALTER, P.A.
1441 Brickell Avenue Ste. 1100
Miami, Florida 33131
Tel: (305) 373-1000
Email: rarnold@knpa.com

ADDITIONAL COUNSEL

Paul E. Slater
SPERLING & SLATER, P.C.
55 West Monroe Street, Suite 3200
Chicago, Illinois 60603
Tel: (312) 641-3200
Email: pes@sperling-law.com

William J. Blechman
KENNY NACHWALTER, P.A.
1441 Brickell Avenue Ste. 1100
Miami, Florida 33131
Tel: (305) 373-1000
Email: wblechman@knpa.com

Joseph M. Vanek
VANEK, VICKERS & MASINI, P.C.
55 W. Monroe, Suite 3500
Chicago, IL 60603
Tel: (312) 224-1500
Email: jvanek@vaneklaw.com

Eric L. Bloom
HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
4400 Deer Path Road, Suite 200
Harrisburg, Pennsylvania 17110
Tel: (717) 364-1003
Email: ebloom@hangley.com

ECORD
AND
RIEF

No. 16-1454

IN THE

Supreme Court of the United States

STATES OF OHIO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MONTANA, RHODE ISLAND, UTAH, AND VERMONT,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, AND AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICI CURIAE* JOHN M. CONNOR, MARTIN GAYNOR, DANIEL MCFADDEN, ROGER NOLL, JEFFREY M. PERLOFF, JOSEPH A. STIGLITZ, LAWRENCE J. WHITE, AND RALPH A. WINTER IN SUPPORT OF PETITIONERS

ANTHONY J. BOLOGNESE
Counsel of Record
BOLOGNESE & ASSOCIATES, LLC
1500 JFK Boulevard, Suite 320
Philadelphia, PA 19102
(215) 814-6750
ABolognese@Bolognese-Law.com

Counsel for Amici Curiae

July 6, 2017

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INTEREST OF *AMICI CURIAE*

The *amici* are eight economists – scholars and experts in competition, industrial organization, and the economic analysis of antitrust issues.[1] *Amici* support the States' Petition for a Writ of Certiorari. The Second Circuit's ruling sets new antitrust standards for analysis in two-sided markets. However, the Second Circuit's decision is based on an incorrect interpretation of the economics of two-sided markets and, as a result, will have serious and adverse impact on antitrust cases that involve or are alleged to involve two-sided platforms.

SUMMARY OF ARGUMENT

The court below erred by (1) assuming that that the characterization of the Amex service as a two-sided platform should fundamentally change the antitrust principles that govern the Amex restraints, (2) misunderstanding the nature of competition in two-sided markets, (3) placing the burden on plaintiffs to disprove that the harm from supracompetitive merchant fees are not outweighed by benefits to third parties (cardholders in this case), and most

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[1] The Appendix to this Brief identifies the Amici. Counsel for *amici* provided counsel for the parties with timely notice of intent to file this brief, and the parties have consented. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The amici include Joseph Stiglitz, who is currently consulting and is a witness for a number of national supermarket and drugstore chains that have challenged Amex's, Visa's, and MasterCard's restraints in related lawsuits pending in the District Court. *See* Appendix 3a.

importantly (4) disregarding the critical antitrust issue – the impacts of the Amex merchant anti-steering and pricing restraints on competition among credit card platforms.

A two-sided platform refers to a seller that brings together two different sets of consumers (the two sides), *and* where increased usage on each side benefits the other side (referred to in economics as two-sided externalities). When a credit card network is new, increased merchant acceptance increases the value to cardholders of having the network's card, and increased card holding makes merchant acceptance of the card more valuable. Such networks are therefore two-sided platforms, and they compete in a two-sided market. With two-sided platforms, pricing on one side of the platform impacts demand on the other, perhaps adding complexity to the analysis of the competitive impact of supra-competitive prices on one side. However, before such complexities are considered for a mature network like Amex, a careful analysis should be conducted to ascertain the significance and importance of any remaining two-sided externalities. The appellate court did no such analysis.

The appellate court ruling purports to be based on the economics of "two-sided markets" in the payments industry, but the ruling departs sharply from prior antitrust analyses and rulings involving two-sided markets. While formal economic analysis of two-sided platforms is relatively new, antitrust analysis of industries involving two-sided platforms is hardly new. For over fifty years, courts have analyzed the competitive impact of restraints on one side of a two-sided platform by focusing on how competition

among competing suppliers is affected.[2] In this case, the appellate court departs from this standard analysis by requiring a plaintiff to show that a competitive harm on one side of a platform (here the merchant side) is not offset by purported benefits on the other side of that same platform (the cardholder side). This is a difficult and unwarranted burden. Amex, as the proponent of and enforcer of the merchant restraints, is clearly in the best position to understand and quantify any relevant offsetting competitive benefits. Creating a new antitrust standard that requires the victim of a restraint of trade to prove that its harm is not offset by benefits to third parties is not sound policy or economics.

Credit card platforms (Amex, Visa, MasterCard, and Discover) compete against each other – or would, if not stymied by Amex's anti-steering merchant restraints – through price competition. The price competition is on each side of the platform. Each credit card platform offers a price pair consisting of a price charged to merchants for the use of the platform's card acceptance services, and also a price charged to cardholders (including benefits in the form of "rewards"). One platform may choose to compete by offering a high merchant price and high rewards to cardholders. Another platform may choose to offer lower merchant fees and lower cardholder rewards, expecting that merchants will steer its

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[2] *See, e.g., Times Picayune Pub. Co. v. United States*, 345 U.S. 594, 610 (1953) (confining competitive analysis to "advertising market, not in readership" while noting that "every newspaper is a dual trader in separate though interdependent markets."); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (analysis of restraints on entry of competing browsers).

customers to that platform's cards by offering discounts or other incentives at the point of sale due to the comparatively low merchant fees.

With competition in the market, each network chooses its preferred price pair. Market forces, including merchant steering and the consumer's ability to choose merchant discounts or incentives over cardholder rewards, would sort out how much of that platform's services will be demanded – that is, its success in the market. The Amex anti-steering merchant restraints directly interfere with this competition among the credit card platforms. With Amex's restraints in place, a rival credit card platform or a new entrant that attempts to compete against Amex with a price pair of lower merchant fees and lower cardholder benefits will be unsuccessful because, under the Amex restraints, merchants are unable to incentivize the cardholders in any way. Thus, a credit card platform with the different pricing model than Amex will garner no additional sales from its competitively low merchant price; it will be driven by the Amex restraints to mimic the Amex pricing.

Competition requires that (1) credit card platforms are able to freely choose their prices, (2) consumers have choices for card network rewards versus the merchant-offered discounts and incentives, and (3) competitive market forces are allowed to determine how much of the platform's services will be demanded. The Amex merchant restraints hinder such competition.

The *amici* respectfully submit that the proper analysis of restraints imposed on one side of a two-sided platform is the established rule of reason

analysis previously recognized by the Second Circuit and adopted by many other Circuits. Under this standard analysis, the first step is to determine if a restraint, whether on one or both sides of a platform, *injures competition between and among platforms.* If a plaintiff satisfies this showing, the defendant can then show procompetitive benefits that may or may not offset the anticompetitive impacts.

If the ruling of the appellate court stands, the adverse competitive impact will be substantial. Credit card platforms process trillions of dollars of transactions in the United States annually. More importantly, firms operating in two-sided markets using the internet, such as Amazon, Uber, Facebook, Google, and Airbnb, are multiplying in number and size. The appellate court decision gives firms in these rapidly developing markets latitude to act anticompetitively on one side of their platform as long as they can point to some indirect or secondary benefit on the other side of the platform populated by a different set of consumers. The appellate court ruling will make analysis of such conduct needlessly complex and, perhaps, beyond the reach of the antitrust laws.

ARGUMENT

I. "TWO-SIDEDNESS"

As noted, a two-sided platform brings together two sets of consumers, and the prices to each set ("side") significantly affect the other side (indirect two-sided externalities).[3] Two-sided industries have

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[3] *See* Jean-Charles Rochet and Jean Tirole, "Two-Sided Markets: A Progress Report," *Rand Journal of Economics* 37(3) (2006), pp. 645-67; Marc Rysman, "The Economics of Two-Sided

included newspapers, television and radio, computer operating systems, dating services, and flight reservation services.[4]

The appellate court emphasized that Amex must attract both cardholders and merchants to its network.[5] But this does not distinguish Amex from any other firm that offers a service and must attract both retailers and end consumers. Nearly *any* firm dealing with merchants could offer the appellate court's improper analysis that a restraint that raises the firm's wholesale price to the merchants passes antitrust muster as long as the restraint provides the firm with revenue that it spends on enhancing the quality of the products it offers to the "other side." A new antitrust doctrine should not follow from a mere

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Markets," *Journal of Economic Perspectives* 23(3) (2009), pp. 125-143.

[4] We write "have included" because as two-sided platforms mature, the externalities from each side to the other can become unimportant and insignificant, rendering the two-sidedness of no relevance. For example, a mature flight reservation system may not attract another airline if it adds more users, and vice versa. If so, there are no remaining significant two-sided externalities. *See U.S. Airways, Inc. v. Sabre Holdings Corp.*, 2017 U.S. Dist. LEXIS 40932 at *32 (S.D.N.Y. Mar. 21, 2017).

[5] *See* Pet. App. 19a-50a (stating that the district court should have considered the effect of the Amex restraints on both merchants and cardholders because: "[t]he revenue earned from merchant fees funds cardholder benefits, and cardholder benefits in turn attract cardholders. A reduction in revenue that Amex earns from merchant fees may decrease the optimal level of cardholder benefits, which in turn may reduce the intensity of competition among payment card networks on the cardholder side of the market").

labeling of a conventional setting as a two-sided market.[6]

Amex's credit card network is a mature business in existence since 1958. By 2012, in the United States, Amex had over 50 million cardholders, was accepted by over 4 million merchants that account for about 95% of all retail sales, and had annual transaction volume of over $590 billion. There is no evidence that significant two-sided externalities remain – that is, that merchant acceptance would increase if Amex increased its cardholding base, or vice versa. Nonetheless, *amici* focus on markets that are characterized by two-sided externalities in which "price changes on one side can result in demand changes on the other side." Pet. App. 8a.

II. PLATFORM COMPETITION IN TWO-SIDED MARKETS

The economic literature analyzing two-sided platforms is new, complex, and evolving. Before courts adopt a new approach to the analysis of competitive impacts in two-sided markets, the extent to which such complexities are relevant to competitive

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[6] In a recent paper co-authored by one of the *amici*, the authors conclude that "[t]he two-sidedness of credit card markets does not require a new set of economic principles for assessing competition policy because the difference between the credit card setting and a conventional one-sided market is essentially a matter of labeling.... Creating different legal rules for the same economic conduct depending on whether the market can be described as one-sided or two-sided is a mistake that could lead to widespread confusion in the evaluation of vertical restriction." D. Carlton & R. Winter, *Vertical MFN's and the Credit Card No-surcharge Rule*, at 40 (working paper available at https://goo.gl/kKd2Ck).

analysis should be fully understood.[7] This is especially important in the case of Amex. Only recently has the economic literature considered the impact of restraints on competition that allow a firm like Amex to charge higher prices to one side (here, merchants), which results in increased prices charged to all customers, and which, through competition on the other side (cardholders), may result in lower prices to that side.[8] The appellate court's analysis and ruling fails to account for this recent learning.[9]

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[7] For example, the appellate court cites a 2013 working paper by Filistrucchi et al. *See* Pet. App. 7a n.3 (citing Lapo Filistrucchi et al., *Market Definition in Two-Sided Markets: Theory and Practice* 5). The analysis therein emphasizes a distinction for competitive analysis between two-sided transactions markets (where, as with payment cards, the two sides directly interact with one another), and two-sided non-transactions markets (where, like newspapers, the two sides do not interact with one another). While noting this paper, the appellate court simply disregards the distinction, providing no guidance for future cases involving two-sided platforms that may differ from the credit card platforms on this account.

[8] Because the Amex restraints adversely impact entry into the credit card market, there can be no presumption that the restraints result overall in lower cardholder prices.

[9] The recent economic literature finds that restraints such as the Amex restraints "typically raise platform fees and retail prices, and curtail entry or skew positioning decisions by potential entrants pursuing low-end business models." *See* A. Boik & K. Corts, *The Effects of Platform Most-Favored Nation Clauses on Competition and Entry*, J. of Law & Econ., Abstract (2016); *accord* S. Schuh et al., *An Economic Analysis of the 2011 Settlement Between the Department of Justice and Credit Card Networks*, J. of Competition Law & Econ. (2012); S. Salop & F. Scott Morton, *Developing an Administrable MFN Policy*, Antitrust (2013); Lear, *Can "Fair" Prices Be Unfair? A Review of Price Relationship Agreements*, UK Office of Fair Trading, Paper #1438 (2012); J. Johnson, *The Agency Model and MFN Clauses* (Jan. 25, 2017) (available at https://goo.gl/Vbj3tV); D. Carlton &

In addition, the major impact of the Amex restraints is direct interference in price competition among credit card platforms. The appellate court puts no importance on this paradigmatic injury to competition.

Instead, the appellate court took a novel and unprecedented approach to analyzing the competitive impact of the Amex restraints. Rather than determining whether the restraints on merchants injured competition among platforms – that is, among competing credit card firms – the court ruled that the proper antitrust analysis must "consider the two-sided net price accounting for the effects of the [restraints] on both merchants and cardholders." Pet. App. 49a. The court held that it was the plaintiffs' burden to show that Amex's restraints had an adverse net effect on competition defined as the sum of the prices to merchants and cardholders. Only after the plaintiffs had made such a showing would Amex be obligated to come forward with any evidence of a procompetitive justification.

If the appellate court were correct that different and new economic analysis is required in two-sided markets – a proposition with which *amici* disagree – it should be applied only after a rigorous and careful demonstration that two-sided market characteristics exist in the market, and are important to the competitive impact of a restraint. More importantly, if a market is demonstrated to consist of two-sided platforms, and if benefits to consumers using one side of a platform (here cardholders) result from restraints that harm the other side (merchants), then a simple

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R. Winter, *Vertical MFN's and the Credit Card No-surcharge Rule* (available at https://goo.gl/kKd2Ck).

summing of these benefits and harms is *not* informative as to the restraint's impact on competition. In addition, further examination of whether there are important cross-platform externalities from which the restraints at issue might harm other platforms needs to be conducted.

The correct approach is to determine whether a restraint on one side of a two-sided market interferes with competition among platforms in the market. The competitive impact of restraints such as those imposed by Amex – restraints that directly alter and impede horizontal competition among platforms – is properly demonstrated only by the impact on the competition among those platforms. The appellate court disregarded this most critical economic issue – how the Amex restraints affect competition among Amex, Visa, MasterCard, Discover, and potential new entrants.[10]

In order to better understand competition in two-sided markets, consider the example of platforms intermediating between hotels and travelers. These platforms can be two sided because the demand for the services by travelers can depend on the number and quality of the hotels that use the service, and vice versa. If a platform lowers its price to travelers, then it can increase the number of travelers using the platform, which may make the platform more valuable to hotels. Similarly, lowering the platform fee charged to hotels can increase the number of

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[10] Visa and MasterCard operate as what is called four-party systems (cardholders, merchants, issuers, and acquirers, *see* Figure 2 at Pet. App. 55a-56a) in which the Visa and MasterCard platforms deal with acquiring banks that compete for merchants and issuing banks that compete for cardholders. This difference from Amex and Discover does not impact our analysis.

hotels using the platform, making the platform more valuable to travelers – the booking service providers are competing in a two-sided market.

Two-sided platforms compete, in part, via the prices offered by each platform to the two sides. For example, one hotel booking service may charge a high price to hotels and a relatively low price to travelers, while other platforms may expect more equal prices to be more profitable, resulting in a better mix of hotels and travelers. Competition is likely to result in competing platforms offering different price pairs, and those offering the price pairs that best satisfy consumer preferences will thrive.

The important economic point is that in two-sided markets, the relevant competition occurs at the *platform level* (*i.e.*, competition among the credit card companies). A competitive two-sided market, through consumers' choices, will effectively decide the preferred and competitive price relationships (the price pair) and, as an incidental matter, the overall "price level" (the sum of the prices) in the two sides. It is this platform competition that is directly interfered with by the Amex restraints on the merchant side of the Amex platform.

Rather than asking whether the Amex rules prevented competitive market forces from determining the price pairs offered by the competing platforms, the appellate court considered only the impact on the Amex prices to both sides of the platform. The court ruled that the competitive metric is whether the *sum* of the two prices increased. This is a fundamental economic error. Whether the sum of the prices goes up or not does not relate to whether

restraints are or are not anticompetitive. Nor does it relate to how the restraints might distort and interfere with the competition among platforms in two-sided markets. When restraints hamper the process of platform competition, anticompetitive harm follows because the restraints alter the price pairs themselves, regardless of whether the sum of the prices increases, decreases, or remains unchanged.[11]

III. THE AMEX RESTRAINTS HARM HORIZONTAL COMPETITION AMONG CREDIT CARD PLATFORMS

The Amex restraints bar merchants purchasing Amex services from differentially pricing the Amex card versus other credit cards. The restraints even bar merchants from providing their customers with accurate information about the prices charged to merchants by Amex and alternative cards. The Amex restraints are vertical restraints, imposed by a supplier on its customers. However, the Amex vertical restraints have direct horizontal effects because they interfere with horizontal competitors' pricing.

The required competitive analysis of a vertical price restraint is set forth in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), and summarized in the appellate court's decision.[12] *Leegin* concerned resale price maintenance (RPM). Unlike the appellate court's ruling, this well-established analysis of RPM finds the first stage of the rule of

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11 *See* P. Areeda & H. Hovenkamp, Antitrust Law § 562e, p. 101 (Supp. 2017) (stating that the Amex court erred because "competition should choose the optimal mix of revenue between the two sides").

12 Pet. App. 30a-31a.

reason satisfied by showing an increase in the retail price. The burden then shifts to the supplier imposing the restraint to show offsetting procompetitive benefits. The failure of the appellate court to follow this approach is not justified by sound economic principles.

With RPM, the suppression of competition at the retail/merchant level is a cost to the supplier imposing the restraint, as the direct effect is reduced demand for the supplier's product from the higher retail price. Therefore, to be of benefit to the supplier, the decision to impose RPM can be presumed to have some non-price, demand-enhancing effects. In contrast, with Amex, the suppression of price competition at the retail/merchant level by Amex provides first-order benefits to Amex, as its competitors are effectively restrained from undercutting its price. Because of this direct reduction in horizontal price competition, Amex's merchant restraints cannot be presumed to be motivated by non-price, overall demand-enhancing effects.

Additionally, the direct impact of RPM on competing suppliers is to increase the demand for their products. In contrast, the Amex restraints provide no direct benefits to Amex's platform competitors; rather, the restraints directly interfere with the other platforms' ability to compete with Amex in pricing to merchants. Yet for analysis of RPM, simply showing an increase in the retail prices to the buyers is sufficient to satisfy the first prong of the rule of reason analysis – an anticompetitive impact. Absent the presumed demand-enhancing impact and the benefit to competitors from RPM, it is not sound economic policy to reject such an

anticompetitive showing in the Amex case simply because the platform may be two-sided.

The practical effect of the Amex restraints is to drive merchants purchasing from Amex to set equal prices for the use of all cards, regardless of their relative cost to the merchant. The result is that merchants' customers paying with credit cards perceive no difference in selecting one credit card versus another, and the customers will be motivated to choose the card considered to offer the highest cardholder benefits. Consequently, as the district court below correctly found, if a payment card platform seeks to compete for transactions with Amex by offering an identical net price, but with lower prices on the merchant side along with higher prices (less rewards) for card users, then its effort will be impeded, not because there is no demand for the platform's services, but because the Amex restraints effectively suppress the demand for such a card on the merchant side. *See* Pet. App. 194a-203a. Therefore, platforms (such as Discover) that attempt to compete with Amex by charging lower merchant fees and equal or possibly lower rewards will realize little benefit from the low merchant fees.[13] As a consequence, the Amex restraints suppress horizontal competition among credit card platforms to increase transactions by charging lower merchant prices. Similarly, the Amex restraints impede competition on the cardholder side by preventing platforms from offering lower prices to merchants in exchange for merchants

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[13] *See* Dist. Ct. Op., Pet. App. 203a-207a (holding that Amex's merchant restraints effectively deny other networks the opportunity to pursue a business model that differentiates itself by offering merchants a low price for greater volume).

offering more immediate and more valuable rewards or discounts to cardholders at the point of sale.

As a result, with the Amex restraints in place, competing platforms will be motivated to raise their merchant price – that is, they will be driven to the Amex business model. In so doing, the platforms have to abandon other competitive business models that they, the retail consumers, the cardholders, and the merchants might prefer.[14] The Amex restraints directly interfere with competitors' ability to compete with alternative platform models offering different and potentially efficient price pairs. This is regardless of whether such competitive price pairs have equal, lower, or even higher total two-sided net prices.

The competitive impact of merchant pricing restraints on entry is also far reaching. The Amex restraints result in all credit card networks competing for transactions only through cardholder benefits provided by the networks at some future point in time. Cardholder benefits and rewards are a way to reduce the net prices paid by the cardholders. But at best, the rewards are a discount on the credit card bill, and the discount accomplishes a price reduction only with a lag in time. The Amex rules prohibit a merchant from accepting payment cards from a competing network that offered rewards in the form of a point-of-sale discount or other benefits received at the time of the sale such as a preferred checkout line. Under the Amex rules, any such point-of-sale benefits

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[14] *See* Dist. Ct. Op., Pet. App. 216a-217a (finding that without Amex's restraints, all four card networks' merchant prices would decrease).

would be considered differential pricing, which is not allowed. Thus, the Amex restraints directly interfere with innovative and potentially efficient alternative platform pricing systems. This important anticompetitive impact was not considered by the appellate court.

With restraints in place that impede horizontal competition regarding pricing to merchants, competition on the cardholder side may or may not increase, and such competition might or might not result in a change to the net prices summed over the two sides. However, such a reduction in the cardholder price, if it occurs, is not a "pro-competitive" or an efficiency-enhancing benefit that offsets the interference with competition on the merchant side. It is, rather, a further economic distortion and inefficiency directly due to the Amex restraints.

The appellate court recognized that in two-sided markets, a platform must "find an effective method for balancing the prices on the two sides of the market."[15] This is the essence of competition in two-sided markets – identifying and offering a price pair that attracts both sides to use the platform. Selecting and offering a preferred price pair, however, is quite different from the situation in which restraints on one side of the market allow for price increases that, through competition on the other side, may lead to price reductions to the second side. While the total two-sided price may be unaffected as the price reduction on one side may completely offset the

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15 Second Circuit Op., Pet. App. 8, n.4 (citing Jean-Charles Rochet & Jean Tirole, *An Economic Analysis of the Determination of Interchange Fees in Payment Card Systems*, 2 Rev. Network Econ. 69, 71 (2003)).

increase on the other side, the resulting price pair has nothing to do with the competitive search for a preferred price pair.

The potential adverse consequences of the appellate court's approach – in which indirect effects on the second side of a two-sided platform must be taken into account in the first step of a rule of reason analysis – can be readily understood by viewing the court's analysis through the lens of traditional and well understood anticompetitive conduct. Consider a case in which Amex, Visa, MasterCard, and Discover agree to fix prices by charging equal and high merchant fees. The obvious anticompetitive harm is the direct interference in platform competition regarding the merchant price. And with merchant restraints in place like those of Amex, which do not allow other credit card platforms to offer lower merchant prices, competition through entry cannot solve the problem. However, if this hypothetical cartel of credit card platform suppliers does not control competition on the cardholder side, then the result is likely to be increased cardholder benefits with reduced cardholder prices, and in the long run, perhaps full dissipation of all the profits earned from the high merchant fees.

No reasonable antitrust scholar would consider the dissipation of profits from price fixing through competition in other markets to be an offsetting procompetitive benefit. Nothing is different about the dissipation of profits from merchant fees propped up by Amex's merchant restraints compared to the dissipation of profits from price fixing. In addition, the hypothetical collusive price fix among credit card platforms would not be considered benign if the "net"

price were unchanged because of the full dissipation of the cartel profits extracted from the merchant side through competition on the cardholder side. Of course, such a price fix would likely be judged under a *per se* standard. But that does not change the fact that the approach taken by the appellate court is economically flawed and unfounded. The outcome of "competition" with restraints such as those imposed by Amex is little different from what would emerge from the collusion example – a non-competitive *price pair* that may or may not alter the sum of the prices.

Whether from collusion or from vertical restraints on differential merchant pricing, Amex and its competitors may benefit during the transition to long-run equilibrium and the full dissipation of profits earned from the supra-competitive merchant prices. Those consumer cardholders that are fortunate enough to meet the credit and income requirements for high rewards cards may also benefit. However, the merchants paying higher prices to Amex, and the merchants' customers using other payment means, are harmed. More importantly, economic efficiency is impeded as price signals are distorted regarding choice of payment means. Customers will be motivated to use their rewards cards even when cash, debit, or check would otherwise benefit them, and customers will be motivated to take inefficient actions to qualify for the high rewards cards.

The appellate court decision imposes on the plaintiffs, the victims of the high prices supported by the merchant restraints, the burden of disproving that the harm they suffer is not outweighed by any benefits to the other side of the platform. This requirement will have substantial adverse impacts on

antitrust enforcement. First, as we have emphasized, the effects on cardholders should not be considered offsetting *procompetitive* effects. Any such benefits to cardholders flow from the merchant restraints that support the supracompetitive merchant fees. Foreclosure of competition effectuated on some consumers should not be justified by an increase in competition somewhere else that the foreclosure motivates.

Second, the merchant restraints are imposed by Amex, the very party best able to understand and quantify any relevant offsetting competitive benefits for the restraints. Perverse incentives will be created if a platform can avoid antitrust liability for harm to one side of the platform, as long as the victim cannot prove that the spoils from that harm are not passed on to the other side. Amex and cardholders control the information concerning cardholder rewards programs – how the programs work, what they cost, and what value they might provide to the cardholders. Amex and cardholders will have no incentive to cooperate with merchants' efforts to show that restraints transferring benefits to Amex and cardholders should not be allowed. Indeed, Amex and cardholders will have incentives to create cardholder programs designed to obfuscate the benefits, increasing plaintiffs' burden.

Third, the appellate court's overly broad conception of two-sided markets could allow any supplier suppressing retail competition through a vertical restraint to point to the possibility of incentives for higher quality, thus shifting the burden back to the plaintiff. Because any suppression of competition in any context carries the possibility of

higher quality resulting from higher prices,[16] antitrust enforcement may become needlessly complex, expensive, and uncertain.

IV. CROSS-MARKET EXTERNALITIES

The Amex restraints increase the price that merchants pay to Amex and thereby raise the costs to merchants for those customers using Amex. The Amex restraints prevent the merchants from differentially raising retail prices to only Amex cardholders to cover that cost increase. The Amex restraints then motivate other credit card platforms to raise their prices to merchants, further increasing the merchants' costs. Dist. Ct. Opp., Pet. App. 207a-209a. Merchants incurring higher costs in turn raise their prices to all their customers.[17] The result is higher retail prices to all the merchants' customers, including those who use low-cost cash or debit cards. These customers, who tend to have incomes or credit scores too low to qualify for rewards credit cards, will thus end up subsidizing the rewards of more affluent cardholders. *Id.* at 210a-212a. This is further evidence of inefficient pricing and a negative externality. These harms occur even if Amex passed on all of its high merchant fees to cardholders through higher rewards, and they are amplified when other credit card platforms increase their merchant prices and

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16 *See* G. Stigler, *Price and Non-Price Competition*, 76 J. Pol. Econ. 149, 149-54 (1968).

17 The appellate court's ruling does not rely on market power in the retail sectors facing Amex's restraints. Rather, the retail markets mainly impacted by the Amex restraints are competitive to a first approximation such that the cost increase caused by higher merchant credit card fees can be presumed to be fully, or nearly fully, passed on to consumers.

cardholder benefits in response to the Amex restraints.

The appellate court requires that analysis in two-sided markets must go beyond the direct effects on competition on the side of the platform where a restraint is imposed. If it is economically relevant to consider the competitive impact beyond the side of the platform where the restraint is imposed, then proper analysis must also consider effects beyond the platform itself, as the restraint can have broad effects on consumers who do not participate on either side of the platform that imposes the restraint.

However, there is a sound economic basis to retain the standard rule-of-reason analysis in which the plaintiff focuses on the direct effects of the restraint in a two-sided market. If the plaintiff succeeds in demonstrating that the challenged merchant restraints adversely impact competition among platforms – here higher platform prices to the merchants from all platform competitors – then the plaintiff's burden should be satisfied. With this initial burden satisfied, the defendant should be required to demonstrate not simply that the other side of the platform is affected, but that there is a beneficial impact on competition among platforms.

Finally, the appellate court suggests that Amex might justify its merchant restraints by a showing that Amex's "output" – that is, the volume of Amex transactions – increased.[18] However, if the Amex restraints have effects beyond the Amex platform, as is the case here, then the Amex output alone is not a

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18 Pet. App. 52a.

proper indicator of the welfare effect of the restraint. A relevant analogy is an exclusive dealing contract. An exclusive dealing vertical restraint may increase the "output" of the firm imposing this restraint, but at the expense of the firm's competitors. The proper measure of output would then be the size of the market served by all competitors.

Here, the fundamental product at issue is "payment." If one desired to determine indirectly through market size the procompetitive or anticompetitive nature of a credit card platform's vertical price restraints, then the proper metric is all payment transactions whether accomplished by credit card, debit card, cash, check, or other means. The effect of the restraint is to increase the subsidization of the users of credit card platforms by customers paying by other means. With increased cardholder benefits resulting from competition on the cardholder side in the face of high credit card merchant fees, customers will be motivated to switch from other payment forms to credit cards. Thus, the usage of credit cards may increase. But this is only evidence of distortion in the competitive process, not that the restraint is procompetitive. For those customers switching to credit cards only because of increased rewards, credit card use can be presumed less efficient than the prior preferred means of payment. As a consequence of the use of less efficient means of payment, the cost of transacting will increase and the total of transactions – the proper measure of output in this context – will be expected to decline.

CONCLUSION

Based on the foregoing analyses, the Amici respectively ask the Court to grant the States' Petition for a Writ of Certiorari.

Respectfully submitted,

ANTHONY J. BOLOGNESE
Counsel of Record
BOLOGNESE & ASSOCIATES, LLC
1500 JFK Boulevard, Suite 320
Philadelphia, PA 19102
(215) 814-6750
ABolognese@Bolognese-Law.com

Dated: July 6, 2017

APPENDIX

APPENDIX

Amicus **John M. Connor** is a Professor of Industrial Economics emeritus at Purdue University. Professor Connor specializes in research and teaching of empirical industrial economics and antitrust policy. His research has been cited in five court decisions and more than 75 law review articles. Professor Connor is also Senior Advisor to the American Antitrust Institute.[1]

Amicus **Martin Gaynor** is a Professor of Economics and the E.J. Barone Chair in Health Systems Management at Carnegie Mellon University. Professor Gaynor has consulted for the Federal Trade Commission and the U.S. Department of Justice, and also consulted for the Netherlands Competition Authority on issues involving vertical restraints and market definition.[2]

Amicus **Daniel McFadden** is a Nobel Laureate in economics (2000) and the E. Morris Cox Professor Emeritus of Economics and the Director of the Econometrics Laboratory at the University of California at Berkeley. Among his many honors, Professor McFadden received the John Bates Clark Medal from the American Economics Association (1975) and the Frisch Medal from the Econometrics Society (2000).[3]

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1 Purdue University, John M. Connor, https://goo.gl/ZaQdzU

2 Martin Gaynor Curriculum Vitae, http://bit.ly/2ffTvQO

3 University of California at Berkeley, Faculty Profiles, McFadden, http://bit.ly/2eoJMk9

Amicus **Roger Noll** is Professor of Economics emeritus at Stanford University and a Senior Fellow and member of the Advisory Board at the American Antitrust Institute. Before coming to Stanford, Professor Noll was a Senior Economist at the President's Council of Economic Advisers, a Senior Fellow at the Brookings Institution, and Institute Professor of Social Science and Chair of the Division of Humanities and Social Sciences at the California Institute of Technology.[4]

Amicus **Jeffrey M. Perloff** is a Professor in the Department of Agricultural and Resource Economics at the University of California at Berkeley. Professor Perloff has authored textbooks on economics including Modern Industrial Organization (with Dennis Carlton), Microeconomics, Microeconomics: Theory and Applications with Calculus, and Estimating Market Power and Strategies (with Larry Karp and Amos Golan).[5]

Amicus **Joseph A. Stiglitz** is a Nobel Laureate in economics (2001) and is University Professor at Columbia University. He is a former senior vice president and chief economist of the World Bank and a former member and chairman of the U.S. President's Council of Economic Advisors. Based on academic citations, Professor Stiglitz is the fourth-most influential economist m the world today.[6]

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[4] Stanford University Public Policy Program, Roger Noll http://stanford.io/2fFUOiP

[5] University of California at Berkeley Department of Agricultural and Resource Economics, Jeffrey M. Perloff Brief Bio, http://bit.ly/2emKIWc

[6] Columbia University, Brief Biography of Joseph E. Stiglitz, https://goo.gl/s6tCkb

Professor Stiglitz currently consulting and is a witness for a number of national supermarket and drugstore chains that have challenged Amex's, Visa's, and MasterCard's restraints in related lawsuits pending in the District Court.[7]

Amicus **Lawrence J. White** is Robert Kavesh Professor of Economics and Deputy Chair of the Economics Department at New York University's Leonard N. Stern School of Business. He has served on the Senior Staff of the President's Council of Economic Advisers, and has also served as the Director of the Economic Policy Office in the Antitrust Division of the U.S. Department of Justice. Professor White is also the General Editor of the Review of Industrial Organization, a journal that focuses on competition and monopoly in their many forms and their effects on efficiency, innovation, and social conditions.[8]

Amicus **Ralph Winter** holds the Canada Research Chair in Business Economics and Policy at the Sauder School of Business at the University of British Columbia. [9] He was previously a Professor of Economics at the University of Toronto, and has also served as President of the Canadian Economics

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[7] Those merchants are: Ahold U.S.A., Inc.; Albertson's, Inc.; BI-LO, LLC; CVS Health, Inc.; The Great Atlantic & Pacific Tea Company, Inc.; H.E. Butt Grocery Co.; Hy-Vee, Inc.; The Kroger Co.; Meijer, Inc.; Publix Super Markets, Inc.; Raleys Inc.; Rite Aid HDQTRS Corp.; Safeway Inc.; Supervalu, Inc.; and Walgreen Co.

[8] New York University Stern School of Business, Lawrence J. White Biographical Summary, https://goo.gl/zCwff1

[9] University of British Columbia Sauder School of Business, Ralph Winter, https://goo.gl/ennG6B

Association. Professor Winter has also consulted for the U.S. Department of Justice and the Canadian Competition Bureau.[10]

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[10] University of British Columbia Sauder School of Business, Ralph Winter Curriculum Vitae, http://bit.ly/2fPyrG9

RECORD AND BRIEFS

Supreme Court, U.S.
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In the Supreme Court of the United States

STATES OF OHIO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MONTANA, RHODE ISLAND, UTAH, AND VERMONT,
PETITIONERS

v.

AMERICAN EXPRESS COMPANY, AND AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR DISCOVER FINANCIAL SERVICES AS *AMICUS CURIAE* IN SUPPORT OF OF PETITIONERS

ELIZABETH P. PAPEZ*
ANDREW C. NICHOLS
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000
epapez@winston.com
**Counsel of Record*

Counsel for Amicus Curiae

QUESTION PRESENTED

This case asks how Section 1 of the Sherman Act, which bans unreasonable restraints of trade, applies to "two-sided" platforms that unite distinct customer groups. Such platforms are ubiquitous, ranging from eBay (serving buyers and sellers), to newspapers (serving readers and advertisers). Here, credit-card networks bring *cardholder* customers together with *merchant* customers for ordinary transactions. When doing so, Respondents American Express Company and American Express Travel Related Services Company ("Amex") contractually bar *merchant* customers from steering *cardholder* customers to credit cards that charge merchants lower prices. Applying the "rule of reason," the district court held that: (1) the Government proved that Amex's anti-steering provisions were anticompetitive because they stifled competition among credit-card companies for the prices charged to merchants, and (2) Amex failed to establish any procompetitive benefits. The Second Circuit reversed. It held that, to prove that the anti-steering provisions were anticompetitive (and so to transfer the burden of establishing procompetitive benefits to Amex), the Government bore the burden to show *not just* that the provisions had anticompetitive pricing effects on the merchant side, *but also* that those anticompetitive effects outweighed any benefits on the cardholder side. The question presented is:

Under the "rule of reason," did the Government's showing that Amex's anti-steering provisions stifled price competition on the merchant side of the credit-card platform suffice to prove anticompetitive effects and thereby shift to Amex the burden of establishing any procompetitive benefits from the provisions?

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INTEREST OF *AMICUS CURIAE*[*]

Discover Financial Services operates the Discover payment network and, along with certain affiliates and third parties, issues Discover-branded payment cards to consumers. As detailed in the District Court's opinion, (*E.g.*, Pet. App. 70a-86a), Discover competes directly with Respondents American Express Company and American Express Travel Related Services (collectively "Amex") on both sides of the "two-sided" (merchant-cardholder) platform described in the decision below. (Pet. App. 39a-40a.) Discover competes with Amex, Visa, and MasterCard in selling network services to merchants and acquiring banks. (Pet. App. 70a, 117a.) And Discover competes with Amex and numerous Visa and MasterCard affiliated banks in issuing payment cards to cardholders. (*Id.*)

Discover has a direct interest in this action because the opinion below reinstates Amex network rules—known as "nondiscriminatory provisions" or "NDPs"—that preclude merchants from steering transaction volume to Discover in exchange for lower merchant fees on Discover-branded card payments. (*E.g.*, Pet. 8; Pet. App. 100a-101a, 203a-207a.) As the District Court found, the removal of the NDPs would result in Discover aggressively competing on both sides of the two-sided platform by offering lower fees to merchants and robust rewards to cardholders. (Pet. App. 219a-220a.)

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[*] Pursuant to Rule 37.2(a), Discover provided timely notice of its intention to file this brief. All parties have consented. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than Discover, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT

The panel opinion reverses a trial judgment in the government's favor on grounds that break from settled antitrust precedents and threaten competition in a host of multi-billion dollar industries. Discover submits this brief to elaborate undisturbed aspects of the trial record that make this case an especially strong and timely vehicle for addressing these consequential departures from federal antitrust law.

The opinion below resolves Amex's appeal of trial findings that "Amex unreasonably restrained trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, by entering into agreements containing nondiscriminatory provisions ("NDPs") barring merchants from (1) offering customers any discounts or nonmonetary incentives to use credit cards less costly for merchants to accept, (2) expressing preferences for any card, or (3) disclosing information about the costs of different cards to merchants who accept them." (Pet. App. 4a.) Petitioners and other government plaintiffs initially brought this enforcement action challenging Visa and MasterCard NDPs as well as the Amex provisions addressed in the panel opinion. (Pet. App. 66a.) Visa and MasterCard resolved the claims against them in a 2012 consent decree, but Amex continued to litigate. (Pet. App. 66a-67a.) Discover—the only new network to enter the payment card industry in decades, (Pet. App. 154a)—testified as a government witness about the anticompetitive effect of the challenged Amex rules on network competition. (Pet. App. 154a, 203a-207a, 212a-214a, 219a-220a.)

After a seven-week bench trial, the District Court issued a 150-page opinion holding that Amex's NDPs unreasonably restrained trade in the U.S. General

Purpose Credit Card ("GPCC") market, *i.e.*, the market in which Amex competes with Visa, MasterCard, and Discover to provide payment network services to merchants and banks. (Pet. App. 69a-71a.) Specifically, the District Court found that Amex's NDPs actually and "adversely affected competition" among the networks, (Pet. App. 148a)—notably by precluding Discover from reaping a "competitive reward for offering merchants lower swipe fees"—and "thereby suppress[ed] an important avenue of horizontal interbrand competition." (*E.g.*, Pet. App. 197a (internal quotation marks and citations omitted).) The trial judgment relied on scores of unrefuted facts supporting this conclusion, (Pet. App. 100a-101a, 196a-197a, 203a-212a), and expressly found that "the failure of Discover's low-price value proposition is emblematic of the harm done to the competitive process by Amex's rules against merchant steering." (Pet. App. 206a.) The District Court further found that these anticompetitive effects were not justified by the NDPs' benefits to cardholders, (Pet. App. 71a, 229a; see also *id.* 228a-258a), and thus held that the rules could not be enforced consistent with the Sherman Act. (Pet. App. 71a, 259a.)

The Second Circuit reversed and ordered judgment in Amex's favor. (Pet. App. 54a.) Specifically, the panel held that the District Court erred as a matter of law in defining the relevant product market as the market for network services to merchants and banks, rather than as the market for network services to merchants, banks, *and cardholders*. (Pet. App. 31a-40a.) Citing this new market definition, the panel held that the government's trial evidence could not prove "net" anticompetitive effects across both "sides" (merchant and cardholder) of Amex's "two-

sided platform." (Pet. App. 49a-53a.) The panel thus reinstated the NDPs that Amex admits preclude merchants from steering business to networks that offer merchants more competitive prices and services. (Pet. App. 100a-101a (citing Amex trial testimony on the ways in which the NDPs "block Amex-accepting merchants from encouraging their customers to use any credit or charge card other than an American Express card, even where that card is less expensive for the merchant to accept"); (Pet. App. 197a ("American Express itself recognizes the absence of competition on the basis of merchant pricing in the network services market.").)

SUMMARY OF ARGUMENT

The opinion below breaks from controlling law in several respects. First, it departs from settled precedents defining antitrust product markets as comprising only goods or services that are reasonably interchangeable to the consumers whose choices are restrained by the allegedly anticompetitive practice. Second, it departs from precedents from this Court and other circuits on appellate treatment of trial findings. Third, the panel's unprecedented approach to market definition and the trial record violates the Sherman Act's central tenet by protecting a particular competitor (Amex) over an undisputed form of price competition. (See, *e.g.*, Pet. App. 100a; 197a.)

Although the text of the Sherman Act prohibits "[e]very contract * * * in restraint of [interstate] trade or commerce," 15 U.S.C. § 1, this Court has construed the statute to "prohibit only *unreasonable* restraints of trade." *E.g.*, *Nat'l Collegiate Athletic Ass'n* v. *Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 98 (1984) (emphasis added). Market definition is critical to as-

sessing whether a challenged restraint is unreasonable because its competitive impact depends on the availability of substitutes for the products or services it allegedly restrains. Accordingly, this Court has long held that the "relevant market for antitrust purposes is determined by the choices available to" consumers of the restrained product or service, *e.g.*, *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451, 481-482 (1992), and is defined by "products that have reasonable interchangeability" with it. *Id.* at 482 (quoting *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956)).

The panel opinion purports to acknowledge these settled principles. (Pet. App. 32a.) But it goes on to abandon them (and create a conflict with precedents from this Court and others) in holding that an antitrust product market includes any product or service whose price or output is allegedly "affect[ed]" by the price or output of the product or service allegedly restrained. (Pet. App. 39a); (Pet. 18-24.) As the District Court observed, there is "no authority" for defining an antitrust product market to match an antitrust defendant's chosen business model. (Pet. App. 119a-120a.) Indeed, the Second Circuit itself has (until now) agreed with this Court that "[t]he relevant market is defined as all products 'reasonably interchangeable by consumers for the same purposes,' because the ability of consumers to switch to a substitute restrains a firm's ability to raise prices above the competitive level." *Geneva Pharm. Tech. Corp.* v. *Barr Labs. Inc.*, 386 F.3d 485, 506 (2d Cir.2004) (quoting *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956)). The panel opinion cannot be reconciled with these precedents.

The opinion also cannot be reconciled with the tri-

al record. Although the panel opinion concedes that market definition is a "deeply fact-intensive" exercise, (Pet. App. 32a), it is not supported by any findings that the services Amex provides to cardholders are "interchangeab[le]" with the services it provides to merchants. *E.g.*, *Kodak*, 504 U.S. at 482. That is no surprise, because the District Court found exactly the opposite under controlling law. (See Pet. App. 114a-122a, 127a); see also, *e.g.*, *Kodak*, 504 U.S. at 482; *Geneva Pharm.*, 386 F.3d at 497 (defining relevant market by reference to "distinct customer group[s]" with different price sensitivities).

These points are critical, because they highlight the panel opinion's departure not only from controlling law on antitrust market definition, but also from this Court's precedents on appellate treatment of trial findings. This Court has long held that where, as here, an appellate panel identifies no clear error in such findings, it "'may not reverse'" simply because it "'would have weighed the evidence differently.'" *Amadeo* v. *Zant*, 486 U.S. 214, 223, 228 (1988) (quoting *Anderson* v. *Bessemer City, N.C.*, 470 U.S. 564, 573-574 (1985)) (reversing circuit court for "engag[ing] in impermissible appellate factfinding"). Yet that is what the panel opinion does.

As detailed below, Discover operates the same type of two-sided (merchant-cardholder) platform that Amex operates. (See Pet. App. 70a, 86a.) The panel opinion does not dispute this, or disturb the trial findings that the services these and other card networks provide to merchants are *not* "interchangeable" with the services they provide to cardholders. (*E.g.*, Pet. App. 111a; 117a-120a, 127a); (see also *id.* 203a-207a, 219a (respecting this distinction while recognizing the "symbiotic relationship" between the

two "sides" of Amex's network platform). The panel opinion simply substitutes a "necessarily affects" test on product pricing for this Court's interchangeability standard for market definition, (Pet. App. 39a), and disregards large portions of the trial record in order to protect Amex's model of competing with Visa and MasterCard. (See, *e.g.*, Pet. App. 48a-49a & n.51 (expressing concerning that the "relief sought by the government in this case could * * * increase market concentration by reducing Amex's share to Visa's and MasterCard's benefit").) Ironically, the result is a controlling circuit opinion that uses "rule of reason" analysis to do exactly what this Court has held such analysis should not: namely, treat "competition itself [a]s unreasonable." *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 696 (1978). Review is warranted because the panel decision threatens competition in the payment card industry and other multi-billion markets that increasingly employ two-sided business platforms, (Pet. 20-25), and because the trial record here—including and particularly the undisturbed findings regarding Discover—make this case a strong and timely vehicle for addressing the question presented.

REASONS FOR GRANTING THE WRIT

I. The Panel Opinion Conflicts With Precedents from This Court and Other Circuits.

The panel opinion purports to apply controlling law to the "evidence presented at trial." (Pet. App. 52a.) But its analysis departs starkly from this Court's precedents and circuit law on market definition and appellate treatment of trial findings.

As noted, this Court has long held that the "rele-

vant market for antitrust purposes is determined by the choices available to" consumers of the restrained product or service, *e.g.*, *Kodak*, 504 U.S. at 481-482, and is therefore defined by "products that have reasonable interchangeability" with it. *Id.* (quoting *Du Pont*, 351 U.S., at 404); (see also Pet. 19-21 (citing authorities).) The panel opinion pays lip service to these standards in stating that the relevant market is comprised of "all products '*reasonably interchangeable* by consumers for the *same purposes*,'" (Pet. App. 32a (emphasis added; internal quotation marks and citations omitted)), and in acknowledging that "market definition is a deeply fact-intensive inquiry," (*id.*). But its analysis rejects these controlling principles in holding that the relevant market for assessing the NDPs' anticompetitive impact includes not only network services to merchants, but also services to cardholders. (See Pet. App. 39a-40a, 49a-50a.)

The panel justified its unprecedented approach to market definition on the grounds that Amex competes with Visa and MasterCard by operating a "two-sided" platform that generates network revenue from both groups of customers. (Pet. App. 16a, 39a-40a, 50a-51a.) But this Court has never held that a defendant's decision to provide services to two distinct groups of consumers should define the product market relevant to alleged Sherman Act violations. Indeed, this Court has expressly *rejected* such arguments. (*See* Pet. 20-25 (citing authorities).) The reason is simple. Interchangeability requires similar products or services as well as similar customer needs and preferences. See, *e.g.*, *F.T.C.* v. *Lundbeck, Inc.*, 650 F.3d 1236, 1239-1243 (8th Cir. 2011) (applying this Court's precedents to define relevant product market by reference to the "reasonable interchangea-

bility" of products and affirming trial court finding that two pharmaceutical drugs were *not* reasonably interchangeable even though FDA classified them as therapeutically equivalent); *Fineman* v. *Armstrong World Indus., Inc.*, 980 F.2d 171, 198-200 (3d Cir. 1992) (same where evidence supported trial finding that resilient floor covering in issue was *not* reasonably interchangeable with other types of floor coverings). That is exactly the analysis the District Court correctly applied here. (See Pet. App. 111a, 117a-120a, 127a.)

The District Court found that although "merchants and their customers jointly make the decision of which method of payment is used for any given transaction, the customer neither sees nor pays the additional cost when networks increase the price of network services to merchants (other than in the form of higher retail prices, which are paid by all consumers)." (Pet. App. 127a.) Accordingly, the "relevant consumer for purposes of assessing price sensitivity in the proposed market and for identifying reasonably interchangeable substitute products is the merchant." (*Id.*)

The panel opinion's contrary conclusion cannot be squared with controlling law or the trial record. The undisturbed trial findings concerning Discover, (Pet. 8)—which again operates the same type of "two-sided" network Amex does, (Pet. App. 23a)—illustrate why. Discover entered the payment card industry in 1985, (Pet. App. 154a), with "breakthrough value propositions" on both "sides" of the market the panel opinion describes, (*id.* 203a.) "Cardholders could receive the first GPCC card with rewards feature at no annual fee." (*Id.*) And merchants had access to "a low-price alternative to the existing GPCC networks"

that "pric[ed] its network services 'very aggressively' * * * setting all-in discount rates significantly below those of its competitors." (Pet. App. 203a-204a.) These "value propositions" reflected a competitive strategy to gain market share by setting merchant "rates significantly below" those of other networks while still offering robust rewards to cardholders. (*Id.*)

This strategy was part of a "'major campaign'" to "help[]" merchants "control payment costs" by steering to Discover. (Pet. App. 204a.) Discover announced this campaign in 1999 in a speech before a trade industry group, and implemented it through a wide variety of merchant outreach initiatives. (Pet. App. 204a-205a.) These efforts included sending letters "to every merchant on its network" to alert them of the other networks' price hikes and encouraging them "to save money by shifting volume to Discover," and also included offering other merchants *additional* discounts from Discover's "already lower prices if [the merchants] would steer customers to Discover." (*Id.* 204a.) Discover recommended that the merchants use "point-of-sale signage" to effectuate the steering and recommended that the merchants pass on their steering-based savings to customers. (*Id.* 204a-205a.)

These and other practices that Amex admits its NDPs preclude, (see Pet. App. 100a-101a), are paradigmatic examples of the kind of price competition the Sherman Act protects. See, *e.g.*, *Atl. Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 340 (1990) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.") But the NDPs prohibit them. (*Id.*) Discover learned from merchant interviews that the "merchant restrictions

imposed by the other payment networks denied merchants the ability to express a preference for Discover or to employ any other tool by which they might steer share to Discover's lower-priced network."[1] (*Id.*) And the District Court expressly found that Amex's NDPs precluded Discover—a "significant competitor in [the GPCC] market," (Pet. App. 86a)—from engaging in precisely the "two-sided" (merchant and cardholder) platform competition the panel opinion cites as central to the antitrust inquiry here. (*E.g.*, Pet. App. 39a-40a; 67a; 203a-207a.)

Notably, the District Court found that Amex's NDPs "render it nearly impossible for a firm to enter the relevant market by offering merchants a low-cost alternative to the existing networks." (Pet. App. 203a.) In support of this finding, the District Court cited unrefuted trial evidence that Discover's attempt in the 1990s to compete with other networks by offering merchants lower fees and better service failed, (Pet. App. 203a-207a), because the NDPs "denied merchants the ability to * * * steer share to Discover's lower-priced network" in exchange for such benefits, (Pet. App. 205a).

These findings were more than sufficient to affirm the trial judgment under market definition precedents from this Court and multiple circuits. Accordingly the panel was forced to break from these decisions to justify its contrary conclusion. The consequences of this undeniable split from settled law are grave. Left undisturbed, the panel opinion's ap-

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[1] Although the District Court noted that Discover's efforts were thwarted by the combination of Visa's, MasterCard's, and Amex's anti-steering restraints, it also found that Amex's rules *alone* would have prevented Discover from steering. (Pet. App. 206a-207a n.43) (emphasis added).

proach to market definition—which the panel found sufficient to disregard the clear and undisturbed trial findings here—could be cited in defense of virtually any anticompetitive conduct as long as the defendant could say it "necessarily affects" prices or other benefits to a related but distinct group of consumers. (Pet. App. 39a.)

The panel opinion purports to downplay the gravity of this new and unprincipled approach to market definition on the ground that it is necessary to account for the "feedback effect" between the two "sides" of the platform Amex operates to compete with Visa and MasterCard. (*E.g.*, Pet. App. 39a (holding that the district court erred in "declin[ing] to define the relevant product market to encompass the entire multi-sided platform" because "the price charged to merchants necessarily affects cardholder demand, which in turn has a feedback effect on merchant demand (and thus influences the price charged to merchants)".) But this assertion simply underscores the need for review, because the District Court expressly recognized the "two-sided nature of" Amex's platform in its "antitrust analysis." (Pet. App. 79a; see also *id.* 80a-84a, 111a-112a, 117a-120a, 125a-128a, 197a, 203a-207a.) It simply (and rightly) found that the NDPs' anticompetitive effects on the merchant "side" of the platform were *not* excused by the benefits they provide Amex cardholders. (Pet. App. 117a-120a, 125a-128a, 203a-207a.)

In support of this conclusion, the District Court cited trial evidence and findings that the services Amex and other networks provide to merchants and cardholders are "distinct, involving different sets of rivals and the sale of separate, though interrelated, products and services to separate groups of consum-

ers." (Pet. App. 119a.) It then cited precedents from this Court and others in concluding that there is "no authority * * * that requires the court to define the relevant product market to encompass the entire multi-sided platform" that Amex chose to adopt as a business model. (Pet. App. 119a-120a (citing *Times–Picayune Publ'g Co.* v. *United States*, 345 U.S. 594, 610 (1953)).

The panel opinion does not address, much less respect, these precedents or findings, (Pet. 21-23 (citing authorities)), all of which support the District Court's conclusion that it is "not necessary that the relevant product market be defined by reference to how American Express chooses to compete in the industry." (Pet. App. 118a.) In reaching this conclusion, the District Court amply addressed the panel's concern with the "feedback" effects of two-sided business platforms. (*E.g.*, Pet. App. 126a.) The District Court considered extensive fact and expert evidence on these effects, (see, *e.g.*, Pet. App. at 118a-120a, 229a-250a), and ultimately concluded that the NDPs resulted in higher prices for both the merchant *and* cardholder "sides" of Amex's platform. (Pet. App. 207a-212a.) The reason, the District Court explained, is that the NDPs enable Amex to charge higher merchant fees "without fear of other networks undercutting their prices," (*id.* 210a), and merchants "pass most, if not all, of their additional costs along to their customers in the form of higher retail prices," (*id.* 210a-211a).

In making these findings, the District Court carefully considered the NDPs' benefits to Amex cardholders. It merely found those benefits limited and insufficient to justify the rules' anticompetitive effects on merchants, because all consumers pay the high retail prices that result from the high merchant

fees, but not all consumers are premium Amex members who receive its cardholder rewards. (Pet. App. 211a-212a.) Based on this and other trial evidence, the District Court found that removal of Amex's NDPs would: (i) "restor[e] downward competitive pressure on merchant prices" that would benefit the merchant "side" of Amex's platform," (Pet. App. 217a-218a); *and* (ii) would *also* "benefit consumers" while protecting cardholder choice, (*id.* at 219a-220a).

The panel opinion does not disturb—or even acknowledge—these findings or the extensive and Discover-specific evidence supporting them. (See Pet. App. 4a-54a, 206a-207a, 219a.) Accordingly, the opinion would warrant review as a departure from settled law even if the relevant antitrust market could be defined as including both "sides" of Amex's network platform. See, *e.g.*, *Amadeo*, 486 U.S. at 223, 228-229 (holding that, absent a finding of clear error, an appellate court may not ignore or reweigh factual findings to reverse a trial judgment); *Anderson*, 470 U.S. at 574-575 (emphasizing trial court "expertise" in fact finding); *Foster* v. *Dalton*, 71 F.3d 52, 55 (1st Cir. 1995) (affirming the district court's trial findings even though the panel would have weighted the evidence differently); *Scandia Down Corp.* v. *Euroquilt, Inc.*, 772 F.2d 1423, 1427-29 (7th Cir. 1985) (rejecting invitation to reweigh the trial evidence and affirming the district court's factual findings).

Here, the trial record, "viewed in its entirety," plainly "permits" the conclusion, *Anderson*, 470 U.S. at 573-574, that the NDPs have a "net" anticompetitive effect in the market for "network services to merchants," (Pet. App. 23a), which is the only product market consistent with this Court's precedents and the record below, (see *id.* 20-25). Further, and criti-

cally, the record permits the same conclusion even if the market is defined to include *both* the merchant and consumer sides of the network platform the panel opinion describes. (Pet. App. 39a-40a; 79a, 83a, 86a, 100a-101a, 191a-258a.) Left undisturbed, the panel's contrary conclusions could be invoked to shield anti-competitive conduct in any number of industries from proper antitrust scrutiny by further muddying an area of law that demands "'clear rules,'" (Pet. 16 (quoting *Pac. Bell Tel. Co.* v. *Linkline Commc'ns, Inc.*, 555 U.S. 438, 452 (2009)), and exacerbating the already "notoriously high litigation costs and unpredictable results" of antitrust litigation under the "rule of reason." (Pet. 16 (quoting *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015) (citation omitted).) Review is warranted for these reasons alone.

II. The Decision Below Departs from the Sherman Act's Central Tenet.

The panel opinion's departure from the law and record is particularly troubling because it sanctions precisely the type of policy judgment the Sherman Act forbids. The decision amounts to a determination that protecting Amex's "unique" method of competing with Visa and MasterCard, (Pet. App. 87a), is more important than allowing Discover's low-price version or, for that matter, any inter-network price competition on merchant network fees at all. (*Id.* 39a-40a, 49a-53a.) In upholding a "restraint that effectively blocks interbrand competition on price" because Amex says it could compete better without price pressure, (Pet. App. 235a), the panel opinion endorses exactly the "frontal assault on the basic policy of the Sherman Act" this Court has admonished against. *E.g.*, *Prof'l Eng'rs*, 435 U.S. at 695; (Pet. App. 235a,

240a-241a).

As this Court has explained, the Sherman Act does not authorize courts to draw lines between "good" competition and "bad" competition, but rather reflects a "legislative judgment that ultimately [all forms of] competition will produce not only lower prices, but also better goods and services." *F.T.C.* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990) (quoting *Prof'l Eng'rs*, 435 U.S. at 695). Any line-drawing among types of competition is a task reserved for Congress. *See United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 611 (1972) ("If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts."). And to date its judgment has been to protect "'*competition*, not *competitors*.'" *Atl. Richfield*, 495 U.S. at 338 (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320, (1962) (emphasis in original) (explaining that "[t]o hold that the antitrust laws protect competitors from the loss of profits due to [nonpredatory] price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share") (citation omitted)).

The panel opinion disregards this fundamental principle in holding that the NDPs and Amex business model they protect are more important than price competition, including the form of price competition offered by Discover that the District Court expressly recognized in its factual findings. (Pet. App. 203a-207a, 219a); (Pet. 8, 33.) As the District Court's opinion illustrates, such a stark departure from this Court's precedents is *not* necessary to ensure proper consideration of antitrust challenges involving two-

sided business platforms.

As noted, the trial record directly links the NDPs' destruction of Discover's low-cost merchant pricing initiative to harm on both the merchant *and* cardholder "sides" of Amex's platform. For example, the District Court found that the NDPs forced Discover to "abandon[]" its low-price campaign to merchants because, as Discover's President, Roger Hochschild, testified: giving the merchants a "discount without getting anything in return didn't make business sense" for Discover. (Pet. App. 206a.) The District Court then went on to find that this restraint on merchant choice harms cardholders, because "inflated merchant discount rates are passed on to all customers—Amex cardholders and non-cardholders alike—in the form of higher retail prices." (*E.g.*, Pet. App. 193a; see also *id.* 210a-211a.)

Based on these and other aspects of the trial record, the District Court found the failure of Discover's low-price campaign "emblematic of the harm done to the competitive process by Amex's rules against merchant steering." (Pet. App. 206a.) And it found that enjoining the NDPs would redress this harm by allowing Discover or other networks "aggressively [to] pursue a strategy of lowering [their merchant] prices" in exchange for volume while still robustly competing for cardholders through rewards and steering benefits. (Pet. App. 219a-220a.) Such competition, in turn, would result in a boon to consumers in form of more rewards and lower prices. (*Id.*)

For all of these reasons, the District Court did not "err[]" in "declin[ing] to define the relevant product market to encompass the entire multi-sided platform." (Pet. App. 39a (internal quotation marks and

citation omitted).) It simply (and correctly) recognized that the merchant "side" of the platform constitutes a distinct product market under this Court's precedents and those of other circuits, (Pet. App. 114a-122a), and left it to competition (rather than the courts or Amex's NDPs) to decide the "optimal mix of revenue as between the two sides." 2017 Supplement, 5E P. Areeda & H. Hovenkamp, Antitrust Law ¶ 562e (4th ed. 2016). That is what the Sherman Act contemplates, and what the panel opinion disregards in conflict with the statute and this Court's decisions applying it.

III. This Case Is a Strong and Timely Vehicle for Reviewing Issues of Exceptional Importance to Multiple Industries.

The reach and impact of the panel's decision is not confined to this case or the NDPs it challenges. As the Petition notes, "two-sided" business models are increasingly ubiquitous. (See Pet. i.) The panel opinion's significance outside the payment card industry is detailed in the Petition. (Pet. 25-35.) But the threat it poses to competition within the payment card industry alone merits attention.

The Second Circuit is home to a longstanding multi-district litigation challenging various Visa and MasterCard rules and fees, including anti-steering rules analogous to the Amex NDPs the panel reinstated below. Last year Visa and MasterCard negotiated—but the Second Circuit disapproved—a $7 billion settlement of various MDL claims that would have immunized a host of network rules from future antitrust challenges. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 231-240 (2d Cir. 2016), *cert. denied sub nom.*

Photos Etc. Corp. v. *Home Depot U.S.A., Inc.*, 137 S. Ct. 1374 (2017). On remand two putative nationwide merchant classes assert, among other things, that:

> Because of the Anti-Steering Restraints [the panel opinion upheld below], a Credit or Debit-Card Network that charges [lower] Merchant-Discount Fees * * * will not be able to make inroads on the monopoly positions of Visa and MasterCard. While * * * competitors such as Discover stand ready, willing, and able to compete with the Defendants by offering lower fees to Merchants, the Defendants' rules prevent and restrain any such competition by ensuring that increased efficiency and lower prices will not lead to increased market share for competitors * * * *

In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 1:05-MD-1720-MB-JO, Dkt. No. 6923, Proposed Amended MDL Damages Complaint ¶ 188 (E.D.N.Y.); *see also id.*, Dkt. No. 6910, Proposed Amended MDL Injunctive Compl. ¶ 157 (similar).

Absent review, the panel opinion will threaten proper antitrust analysis of these and related claims within the Second Circuit. Like the Amex NDPs the panel reinstated below, many of the Visa and MasterCard rules challenged in these pending actions could be cast as restraining network competition over merchant fees or services in order to protect or benefit cardholders. Accordingly—and perversely—the panel's decision to break from the law and record to protect rules the panel perceived as central to Amex's ability to compete with Visa and MasterCard, (see,

e.g., Pet. App. 48a-49a n.51), could end up being used to defend a host of Visa and MasterCard rules from antitrust challenges going forward.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

ELIZABETH P. PAPEZ*
ANDREW C. NICHOLS
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000
epapez@winston.com

**Counsel of Record*

July 6, 2017

RECORD AND BRIEFS

No. 16-1454

IN THE

Supreme Court of the United States

STATES OF OHIO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MONTANA, RHODE ISLAND, UTAH, and VERMONT,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, and AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE FORMER FEDERAL ANTITRUST OFFICALS

K. CRAIG WILDFANG
RYAN MARTH
ROBINS KAPLAN LLP
800 LaSalle Avenue
Suite 2800
Minneapolis, MN 55402

DEEPAK GUPTA
Counsel of Record
MATTHEW SPURLOCK
GUPTA WESSLER PLLC
1900 L Street, NW
Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

Counsel for Amici Curiae

(Additional Counsel Listed On Signature Page)

July 6, 2017

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INTEREST OF AMICI CURIAE[1]

The amici curiae are former federal antitrust officials. They submit this brief to lend their expertise on the development and enforcement of antitrust law. This brief explains why this Court should grant certiorari to clarify the burden of proof under the rule of reason in cases involving "two-sided platforms." It also explains why the Acting Solicitor General's failure to join the states' petition should not dissuade the Court from addressing this important issue.

Donald Baker served as Assistant Attorney General in the Antitrust Division of the United States Department of Justice during the Ford and Carter Administrations. Baker served for nearly a decade on the Antitrust Division career staff, and he was the Deputy Assistant Attorney General responsible for overseeing the appellate, economic, and policy planning staffs of the Division (1972–75). He was a Professor of Law at the Cornell Law School (1975–78), and is now an Adjunct Professor at the George Washington University School of Law.

Albert A. Foer served in various capacities in the Federal Trade Commission's Bureau of Competition, including as Acting Deputy Director (1975–81). He was a Commissioner on the National Commission on Electronic Fund Transfers in the mid-1970s. After departing government service, Foer was CEO of a retail company and in 1998 founded the American Antitrust Institute (AAI), which he led until his retirement in 2014. Under Foer's leadership, the AAI grew to be the nation's leading public-interest organization principally dedicated

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

to the well-informed yet aggressive enforcement of the antitrust laws. Foer currently serves as a Senior Fellow at AAI, although he speaks only for himself through this brief.

Don Allen Resnikoff served for twenty years as an antitrust litigator with the Antitrust Division of the United States Department of Justice, and eight years as Senior Assistant Attorney General with the District of Columbia Office of the Attorney General, specializing in affirmative antitrust litigation. He has been active in private litigation involving electronic payment issues.

Maurice E. Stucke served for over a decade as an antitrust litigator with the Antitrust Division of the United States Department of Justice. He is a law professor at the University of Tennessee, and serves as one of the United States' non-governmental advisors to the International Competition Network, as a Senior Fellow at the American Antitrust Institute, and on the board of the Institute for Consumer Antitrust Studies.

INTRODUCTION AND SUMMARY OF ARGUMENT

This petition involves an antitrust issue of exceptional importance to the modern economy: the application of the rule of reason to industries that function as two-sided platforms. "In a two-sided platform," a firm "sells different products or services to two separate yet interrelated groups of customers"—like merchants and consumers in the credit-card industry. Pet. App. 77a. The district court and court of appeals disagreed on what burden of proof antitrust plaintiffs must bear in such circumstances.

Clarity about this key element of the antitrust-enforcement regime is necessary for the law to "evolve to meet the dynamics of present economic conditions." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007). And this Court's central role in

shaping the common law of antitrust makes its review of this discrete legal issue both timely and appropriate in this case, especially because this Court has had few opportunities to weigh in on cases brought by government antitrust authorities over the last forty years.

The Acting Solicitor General's failure to join this petition—at a time when both the Antitrust Division and the Solicitor General's office lack Senate-confirmed leadership—does not diminish the importance of clarifying the proper burden of proof in two-sided platform antitrust cases. The government plaintiffs are ably represented by eleven sovereign states. And, of course, the federal government's voice need not go unheard. The Court may call for the views of the Solicitor General, both as to this petition and on the merits.

ARGUMENT

I. In light of this Court's special role in shaping antitrust doctrine, and the fundamental and economically important questions concerning the rule of reason presented here, certiorari is warranted.

This case presents exceptionally important issues of antitrust law—issues that are both critical to the functioning of our economy and necessary to ensure that federal courts have sufficient guidance in antitrust litigation. In the decision below, the Second Circuit reasoned that the district court should have treated the merchant and consumer markets together, and that the government had failed to carry its burden to show, in the first instance, that both sides of the platform were "worse off overall." Pet. App. 51a. The states now seek this Court's review to clarify the proper burden of proof for antitrust plaintiffs in two-sided platforms like the credit-card industry.

Clarifying the burden of proof for two-sided platforms under the rule of reason is a prudent and timely use of the Court's limited docket. "[I]n the last quarter of the twentieth Century" the Court's antitrust docket did not keep pace with an increasingly complex economy. R. Hewitt Pate, Assistant Att'y Gen., U.S. Dep't of Justice, Address to the British Institute of International and Comparative Law Conference: Antitrust Law in the U.S. Supreme Court (May 11, 2004). Instead, the Court "began hearing fewer antitrust cases." *Id.* The shift especially affected government-initiated antitrust litigation after the 1974 amendments to the Expediting Act, 15 U.S.C. § 29(b), which "dramatically altered appellate procedure" by effectively terminating direct Supreme Court review of these appeals. *United States v. Am. Tel. & Tel. Co.*, 714 F.2d 178, 181 (D.C. Cir. 1983). As a result, "disputes . . . between private parties" predominate, and "the cases finding their way to the Court no longer reflect the [government's] enforcement agenda." Pamela Jones Harbour, *The Supreme Court's Antitrust Future: New Directions or Revisiting Old Cases?*, The Antitrust Source (Dec. 2007), at 2.

This trend has begun to reverse in recent years. Thomas A. Lambert, *The Roberts Court and the Limits of Antitrust*, 52 B.C. L. Rev. 871, 872 & n.2 (2011) (citing Herbert Hovenkamp, *The AntiTrust Enterprise: Principle and Execution* 6 (2005)). But this Court's review of cases pursued by antitrust authorities remains exceedingly rare. Donald I. Baker, *The DOJ's regrettable 'no appeal' decision in Amex*, Global Competition Rev. (June 13, 2017), http://bit.ly/2sNSLxx. Given the importance of "clear rules" to business and consumers, *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 555 U.S. 438, 452 (2009), and the dilemma of sometimes "amorphous" rule-of-reason analysis, *F.T.C. v. Actavis, Inc.*, 133 S. Ct. 2223, 2238 (2013) (Roberts, J.,

dissenting), the Court should step in to decide an issue of immense importance to the modern economy.

Congress enacted the Sherman Act to protect consumers and promote competition by prohibiting business practices "in restraint of trade." 15 U.S.C. § 1. Section 1 of the Act is the "kernel" of antitrust law, "embracing fundamental concepts with a simplicity virtually unknown in modern legislative enactments." William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 Tex. L. Rev. 661, 662–63 (1982). Congress "expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978). As a consequence, the antitrust framework "effectively authorize[s]"—and requires—"courts to create new lines of common law." Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 544 (1983). And "[f]rom the beginning," the Court has taken this responsibility seriously, stepping in to adapt antitrust law to "new circumstances and new wisdom," *Leegin*, 551 U.S. at 899–900 (internal quotations omitted), to keep pace with evolving business strategies that "short-circuit the ordinary price-setting mechanism," Pet. App. 71a.

This Court established the contours of the modern antitrust framework in two landmark 1911 opinions announcing the "rule of reason"— the same analysis that the courts below endeavored to apply to American Express's contractual anti-steering provisions in this case. *See* Pet. App. 26a; *id.* at 105a–106a. The guiding principal of antitrust, the Court explained, was the prohibition of "all contracts or acts which were unreasonably restrictive of competitive conditions." *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911). The Act's bar against "restraint of trade," in other words, was not absolute. It only prohibited business practices that

"operated to the prejudice of the public interests by unduly restricting competition." *United States v. Am. Tobacco Co.*, 221 U.S. 106, 179 (1911). Seven years later, the Court elaborated, explaining that rule-of-reason analysis requires consideration of "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; [and] the nature of the restraint and its effect." *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

In the intervening century, the Court has sought to refine the rule-of-reason framework, addressing changing business models, firm strategies, and economic structures, as well as political, intellectual, and theoretical developments. In *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), for example, the Court held that vertical maximum pricing fixing is per se unlawful under the Sherman Act. But, three decades later, it reconsidered and overruled that approach on the basis of "a considerable body of scholarship discussing the effects of vertical restraints" and the "general view that the primary purpose of the antitrust laws is to protect interbrand competition." *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997).

The continued evolution of antitrust law depends on this Court's elaboration of basic legal questions in novel and economically important areas. "[A]t every stage of the journey the most significant mileposts have been decisions of [the] Supreme Court." Pate, *supra*. As a former attorney in the Antitrust Division recently observed, "it is appropriate and often necessary for courts to update the law in order to make sure it continues to serve its function in ever-changing social and commercial realities." Daniel M. Tracer, *Stare Decisis in Antitrust: Continuity, Economics, and the Common Law Statute*, 12 DePaul Bus. & Com. L.J. 1, 39 (2013). And more recently the Court has continued to elaborate on the scope and application of the rule of reason. *See*

Actavis, 133 S. Ct. at 2237 (holding that rule of reason applies to "reverse payment settlements" by patent holders to infringers); *Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756 (1999) (applying rule of reason to advertising restrictions imposed by professional association); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006) (applying rule of reason to joint venture).

The question of what burden of proof to impose on antitrust litigants—in a $2.4 trillion credit-card industry operating on a two-sided platform model, Pet. App. 74a—is a basic issue critical to the operation of the rule of reason, and is thus an appropriate issue for resolution by this Court. *See Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695 (explaining that defendants bear the burden of justification "under the Rule of Reason."); *Cal. Dental Ass'n*, 526 U.S. at 788 (Breyer, J., concurring in part and dissenting in part) (plaintiff's burden is to show that restraint is *prima facie* anticompetitive; and "the defendant bears the burden of establishing a procompetitive justification").

Indeed, this case offers the Court its first opportunity in over sixty years to consider how the rule of reason should be applied to two-sided platforms. *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 610 (1953) (distinguishing a newspaper's market in readers and advertisers). Whatever the Court's conclusion with respect to the distribution of burdens under rule-of-reason analysis, certiorari is warranted to resolve the issue for the "dominant form of business organization in a wide variety of industries, including many economically significant ones." David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 Colum. Bus. L. Rev. 667, 668 (2005) (citing American Express, Google, the New York Stock Exchange, and Microsoft software platforms).

II. This Court should grant certiorari despite the federal government's failure to join the petition—especially given the role of the states in this litigation.

The fact that the federal government has failed to join the states' petition for certiorari should in no way dissuade this Court from granting review.

From the inception of this litigation in the district court through the petition for en banc review in the Second Circuit, the state petitioners and the U.S. Department of Justice worked hand in glove as co-plaintiffs. This cooperative effort is not unique. The states have long enforced the Sherman Act in their capacity as *parens patriae*—a role statutorily recognized by Congress in the Hart-Scott-Rodino Antitrust Improvements Act of 1976. 15 U.S.C. § 15c. And the authority of multiple parties—including states—to enforce antitrust law is "an integral part of the congressional plan for protecting competition." *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990). In addition to antitrust actions brought by private plaintiffs, for example, the Court has ruled on important legal issues in the Federal Trade Commission's enforcement actions. *See, e.g., Cal. Dental Ass'n*, 526 U.S. at 788; *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *F.T.C. v. Indep. Fed'n of Dentists*, 476 U.S. 447 (1986). And state attorneys general have appeared—and prevailed—in the Court more recently than the Antitrust Division. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795–96 (1993) (in a suit brought by nineteen states, applying the Sherman Act to domestic and foreign insurers who conspired to affect the domestic market). The states' petition for certiorari in this Court is perfectly consistent with these precedents.

For the same reasons, concerns regarding the supposed parochialism of state-led antitrust actions are inapposite here, where petitioners have vigorously litigated this case—and the appeal—alongside the Department of Justice. Some critics of state antitrust enforcement raise a variety of concerns: "uncertainty" and "over-deterrence" due to overlapping enforcement authority, the use of "discarded" or rejected antitrust theories, and the improper influence of lobbyists representing "businesses within [the] states." Deborah Platt Majoras, Deputy Assistant Att'y Gen., Antitrust Division, U.S. Dep't of Justice, Remarks Before the New York State Bar: Antitrust and Federalism (Jan. 23, 2002), http://bit.ly/2sHrJg6 (collecting and describing criticism). But, whatever merits these critiques may have for piecemeal state antitrust enforcement, they have no purchase where states have litigated a case alongside federal antitrust authorities from the outset. *See* Complaint, *United States of America v. American Express Co.*, No. 10-4496 (E.D.N.Y. Oct. 4, 2010); Amended Complaint, *United States of America v. American Express Co.*, No. 10-4496 (E.D.N.Y. Dec. 21, 2010); *see also* Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 Geo. Wash. L. Rev. 1004, 1024 (2001) (describing advantages of state-federal cooperation in antitrust enforcement). Indeed, Congress "anticipated that federal and state enforcers would work together"—as they have here—to enforce antitrust laws. Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 Duke L.J. 673, 683 (2003).

The Acting Solicitor General's failure to join the states' petition can be explained by the unusual circumstances in which the decision was made. It likely reflects "the interregnum in the [Antitrust] Division's leadership resulting from the change in administration," rather than the considered judgment of the Department or the

Solicitor General. Baker, *supra*. Indeed, the Antitrust Division has had two acting heads since January, and the Solicitor General's Office still lacks Senate-confirmed leadership. In these circumstances, the petition for rehearing in the court of appeals, filed by state plaintiffs and the Department of Justice, is a better indication of the federal authorities' considered position with respect to this litigation—and the legal question presented. Pet. of the United States and Plaintiff States for Panel Rehearing and Rehearing En Banc, *United States v. American Express Co.*, No. 15-1672 (2d. Cir. Nov. 10, 2016).

In any event, the federal government's voice need not go unheard. As it frequently does, this Court may well wish to call for the Solicitor General's views with respect to this petition and on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DEEPAK GUPTA
Counsel of Record
MATTHEW SPURLOCK
GUPTA WESSLER PLLC
1900 L Street, NW
Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

K. CRAIG WILDFANG
RYAN MARTH
ROBINS KAPLAN LLP
800 LaSalle Avenue
Suite 2800
Minneapolis, MN 55402

KENNETH L. ADAMS
RICHARD J. LEVERIDGE
CHRISTOPHER T. LEONARDO
ADAMS HOLCOMB LLP
1001 Pennsylvania Avenue, NW
Suite 740-South
Washington, DC 20004

MICHAEL ANGELOVICH
NIX, PATTERSON & ROACH, LLP
3600 N. Capital of Texas Hwy
Suite B350
Austin, TX 78746

MICHAEL BUCHMAN
WILLIAM H. NARWOLD
MOTLEY RICE LLC
600 Third Avenue
Suite 2101
New York, NY 10016

July 6, 2017

Counsel for Amici Curiae

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STATE OF OHIO, ET AL.,

Petitioners,

v.

AMERICAN EXPRESS CO., ET AL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* RETAIL LITIGATION CENTER, INC. IN SUPPORT OF PETITIONERS

DEBORAH WHITE
Retail Litigation Center, Inc.
1700 N. Moore Street, Suite 2250
Arlington, VA 22209

DEBRA L. GREENBERGER
Counsel of Record
Emery Celli Brinckerhoff & Abady LLP
600 Fifth Avenue, 10th Fl.
New York, New York 10020
(212)763-5000
dgreenberger@ecbalaw.com

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INTEREST OF AMICUS AND SUMMARY OF ARGUMENT[1]

Amicus, the Retail Litigation Center, Inc., represents national and regional retailers. The RLC identifies and engages in legal proceedings that have a national impact upon the retail industry. The RLC's members employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues and to highlight the industry-wide consequences of significant pending cases. RLC's members include many of the country's largest and most innovative retailers, across a breadth of industries: Home Depot and Lowe's, Target and Walmart, Pepboys and AutoZone, as well as Whole Foods, Apple, Best Buy, and many more.

The RLC submits this *amicus* brief because retailers pay billions of dollars annually in fees to credit card companies—costs that raise retail prices for everyone. Though many RLC members compete

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[1] No counsel for a party authored this brief in whole or in part, and no party or entity, other than the RLC, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The undersigned counsel provided appropriate notice to all counsel of record of its intention to file an *amicus curiae* brief, in accordance with Supreme Court Rule 37(2)(a). The parties have filed blanket permissions to file amicus briefs.

with one another for customers, they are united here in the view that Amex's anti-steering rules inflict significant harm to their business and to the national economy.

Amex's rules protect it—and also protect Visa, Mastercard, and Discover—from having to compete for business from retailers. While credit card companies value merchant acceptance, Amex's rules ensure *no* credit card company competes to offer merchants lower prices. Why would they? Amex's anti-steering rules mean that merchants cannot avoid more expensive networks by shifting transactions to networks with lower merchant fees. As a result, the networks view lowering fees as "leaving money on the table," as one network testified. 206a. So it is little surprise that the rates merchants pay have only increased. This is no small problem: credit cards process over $3 trillion in annual spending, and the rules at issue impede competition in 90% of those transactions. And given the continuing rise in Internet sales and "mobile pay" apps, credit cards will process an ever larger portion of Americans' spending.

Antitrust law should care deeply about Amex's conduct. Indeed, in a 150-page opinion, the district court found that Amex's conduct violates the Sherman Act by suppressing horizontal price competition—and safeguarding such competition is the primary objective of antitrust law. The Second Circuit's reversal, on this important issue of federal law, warrants certiorari. Retailers ask this Court to grant review and reinstate the district court's injunction and the hope it offered of subjecting credit card processing fees to competition.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS MISCONSTRUES FEDERAL LAW ON A MATTER OF NATIONAL IMPORTANCE

If left to stand, the Second Circuit's opinion will constrain price competition in nearly every credit card transaction, harming merchants and consumers alike.

The importance of this federal question to the national economy warrants certiorari. *See* S. Ct. Rule 10(c). Particularly in cases involving Section 1 of the Sherman Act, this Court has long acknowledged that "the importance of [an] issue . . . for the administration of the antitrust laws" can be a sufficient reason to grant review, *Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 820 (1978), and has repeatedly granted certiorari in important antitrust cases even in the absence of an inter-circuit conflict. *See, e.g.*, *Texaco Inc. v. Dagher*, 547 U.S. 1, 3 (2006); *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 33 (2006); *F.T.C. v. Ind. Fed'n of Dentists*, 476 U.S. 447, 453 (1986); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 681 (1978); *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 136 (1968), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Here, the sheer volume of consumer transactions affected—both in absolute terms and as a proportion of the national economy—warrants this Court's consideration of this case.

A. Because Amex's Anti-Steering Rules Restrain Horizontal Price Competition Among *All* Credit Card Companies, This Case Affects Over 90% of Retail Transactions

Amex's anti-steering rules harm merchants and consumers alike. As the district court found, many merchants, particularly the large and multi-location retailers that account for the bulk of credit card charge volume, cannot stop accepting Amex without losing an unacceptable portion of their sales. 70a-71a, 158-159a, 163a-165a, 168a-169a.

In a competitive market, those merchants could nonetheless pressure Amex to reduce its card acceptance charges by shifting transactions toward networks that offer lower pricing. But Amex's anti-steering rules, born in an attempt to increase their market share, prevent that. *See* 90a-94a (detailing history of anti-steering rules). Further, those rules obstruct Amex customers from deciding for themselves whether any promotion merchants would offer to encourage use of competitor cards outweighs the value of Amex's rewards. Consumers and merchants cannot decide what is in the "joint" economic interest. 81a. Instead, relying on its market power, Amex has decided that it is in its *own* economic interest to avoid any threat of price competition on the fees merchants pay and has successfully imposed rules vitiating that threat.

Worse, because Amex's rules bar merchants accepting Amex from offering incentives to steer customers from (or to) *any* credit card, they remove any incentive for Visa, Mastercard or Discover to

undercut Amex's price to obtain more transactions. As a result, Amex's rules also increase the costs those networks charge merchants. 70a-71a, 102a, 191a-192a, 194a-195a, 203a.

This is critical: although Amex's rules are *vertical* restraints because they govern Amex's relationship with its customers (the merchants), they restrain *horizontal* price competition, *i.e.* competition among credit card brands. This Court has recognized that protecting horizontal competition—competition between rivals—is "the primary purpose of the antitrust laws." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007). Yet as the district court found, horizontal interbrand competition "is frustrated to the point of near irrelevance in the network services market" because of the rules challenged here. 195a.

In a functioning competitive market, customers steer their business to lower priced alternatives; lower prices yield higher demand. When McDonald's lowers its Big Mac prices, more customers buy Big Macs and fewer buy Burger King's Whoppers. Downward pressure on pricing is common in the retail industry, where tight margins mean that retailers "promot[e] competition among multiple suppliers, often by rewarding competitive bidders with increased purchase volume." 216a.

That link between price and demand is essential to price competition. Indeed, Amex's witnesses admitted under oath that Amex "would face increased pressure to reduce its rates if merchants could shift share to a less expensive network." 218a. Discover admitted the same. 219a. In fact, the court of appeals acknowledged that Amex's rules "affect

competition," finding that the anti-steering rules "protect[] the critically important revenue that Amex receives from its relatively high merchant fees." 50a. But how Amex "protects" the revenue is by shielding the prices it charges merchants from inter-brand competition—precisely what antitrust law forbids.

In a world without anti-steering rules, Best Buy, for example, could negotiate with Discover for a reduced rate and then offer a designated checkout lane for Discover customers. 101a. Or Walmart could offer a discount on prescriptions to customers using a card with lower fees, thereby passing some of its cost savings to consumers. Each Amex customer could then decide whether the cardholder rewards Amex offers are worth waiting in the longer line or paying more for their medicine. Yet merchants are barred under Amex's rules from even making those offers. Similarly barred is any disclosure to customers comparing "the relative costs of acceptance across card brands." 101a. A retailer cannot even *inform* customers that Amex is costlier than Discover and let them do as they wish with that information.

In *Expressions Hair Design v. Schneiderman*, this Court examined a state law that barred merchants who wished "to discourage the use of credit cards" from surcharging credit card prices. 137 S. Ct. 1144, 1146 (2017). Finding that the surcharging ban regulated merchants' ability to communicate truthful pricing information to their customers, the Court held that First Amendment scrutiny was required. *Id.* at 1151. Amex's challenged rules similarly attempt to interfere with the sharing of truthful information between merchant and consumer.

Amex's rules, like the rules at issue in *Expressions*, exist to hide information from consumers. As a result, most customers never know that the Amex cards they carry raise prices for everyone—the predictable result of a restraint on horizontal competition. *See Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756, 784-85 (1999) (Breyer, J., concurring in part and dissenting in part) ("To restrain truthful advertising about lower prices is likely to restrict competition in respect to price—the central nervous system of the economy." (internal quotation marks omitted)).

Notably, the steering that merchants seek to do affects behavior only where "both the merchant-consumer and the cardholder-consumer derive a net benefit." 257a. The "economically rational consumer will not accept a merchant's invitation to use another card product unless he believes that what the merchant is offering is of greater value than the rewards or other benefits he receives for using his Amex card." *Id.* The anti-steering rules exist to *prevent* merchants and consumers from determining, on the basis of complete and accurate information, whether there is a "net benefit" to using an Amex.

Because merchants cannot influence cardholders' choice of card to use, when "faced with a price increase," merchants' "recourse . . . is an 'all-or-nothing' acceptance decision." 159a-160a. This is no choice at all. "Nothing," *i.e.* dropping Amex altogether, is "commercially impractical." 159a. Amex accounts for 26% of charging volume, so no major retailer can afford to refuse to accept Amex. 155a, 159a n.27. Even the largest merchants—including RLC's members—"are not immune" to this

"all-or-nothing" bind. The evidence bears this out: When Walgreens—then the nation's ninth largest retailer—attempted to combat Amex's rising rates by dropping Amex, it was soon forced by lost sales to reaccept the card on the same terms it had earlier refused. 163a-164a.

In addition to removing any incentives for incumbent networks to compete on the prices they charge for card acceptance, Amex's anti-steering provisions also "render it nearly impossible for a firm to enter the relevant market by offering merchants a low-cost alternative." 203a. Again, this is not merely theoretical. Discover originally attempted to enter the network services market as a "low price" alternative to the big three credit card companies. But it soon learned that anti-steering rules made competing on price irrelevant. Because it could not attract additional business by offering low prices, Discover realized it was "leaving money on the table" by not raising prices. 206a. So it did. It raised its rate 24% between 2000 and 2007—with "virtual impunity"—and its rates are now similar to Visa's and Mastercard's. 206a; 210a.

Though Visa and Mastercard settled this case and agreed to remove their equivalent anti-steering rules, no Amex-accepting merchant can "offer a discount to MasterCard cardholders if they use a Visa card instead." 102a; 180a ("Amex has been able to perpetuate [rules prohibiting steering] even after Visa and MasterCard abandoned their anti-steering rules as a result of this litigation"). Because every

major retailer—more than 90% by volume[2]—accepts Amex, the rules challenged here not only insulate Amex from competition, but effectively suppress competition among *all* credit card companies. As the district court found, "[e]ach of the credit card networks is largely insulated from the downward pricing pressure ordinarily present in competitive markets." 197a.

This results "in higher prices for merchants," as the district court found (a finding left undisturbed by the court of appeals). 192a; 49a-51a. In turn, "inflated merchant discount rates are passed on to all customers"—"in the form of higher retail prices." 192a; 193a. Amex said this well, in an *amicus* brief filed in a challenge to Visa's anti-competitive practices: "Decreased competition in the sale of an input or intermediate good, such as network services,

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[2] Two-thirds of credit card-accepting merchants, by raw number, accept Amex. 17a, 46a. But that understates the case because every major retailer—from 7-Eleven, to Apple, to Target, as well as every major supermarket chain and department store—accepts Amex. It is the "very small merchants," those with under $50,000 in annual volume—smaller than your local florist—who may not accept Amex. 224a & n. 48. In considering the market effects on Amex's anti-steering rules, the more appropriate analysis requires weighting the number of merchants by charge volume. By that measure, the force of Amex's anti-steering rules is laid bare: over 90% of merchants, by card volume, accept Amex. *See* American Express Company, Annual Report (Form 10-K), at 3 (Feb. 17, 2017), *available at* http://www.snl.com/Cache/c38117384.html.

is harmful to consumers no matter how competitive the downstream market may be." 239a-240a n.55.

Competition in the credit card industry is limited to attracting cardholders, with no competition for the costs merchants pay and pass on to the retail economy. Amex, Visa, and Mastercard "fiercely compete to acquire new cardholders," while insulating themselves from competition for merchant acceptance. 238a.

Accordingly, the challenged rule not only affects the 26.4% of purchases (by dollar amount) made using an Amex, 151a—but, in fact, affects the more than 90% of retailers (by charge volume) that accept Amex. This case thus warrants certiorari because it concerns nearly every dollar that Americans spend using a credit card as well as retail prices throughout the economy, regardless of the form of payment used by the consumer at check-out.

B. Amex's Anti-Competitive Rules Increase Merchants' and Consumers' Costs in a $3 Trillion Sector of the Economy

The four dominant credit networks collectively processed over $3 trillion in purchases last year.[3] That figure reflects a dramatic 25% increase from the $2.4 trillion in purchases just three years ago, as the rise of Internet sales has marginalized cash. 74a.

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[3] *See* Nilson Report Issue 1103 (Feb. 2017), *available at* https://www.nilsonreport.com/publication_newsletter_archive_issue.php?issue=1103.

The networks charged merchants tens of billions of dollars in fees on those transactions. "The costs associated with accepting credit and charge cards are among many merchants' highest," as the district court found after extensive testimony. 221a-222a. Merchants pay billions of dollars in fees each year to accept credit cards. An airline testified that its credit card costs were *twice* as much as its domestic labor costs. 222a. Ikea testified that the only costs that exceed credit card costs are labor, advertising, and rent. 222a. These higher costs are reflected in the "higher retail prices" consumers then pay. 192a; 193a.

And these substantial fees are rising. The district court found Visa and Mastercard were able to increase merchant rates by more than 20% from 1997 to 2009—without fear of other networks undercutting them on price. 210a. Amex too raised its discount rate for millions of merchants twenty separate times over a five year period, for a total of $1.3 billion in incremental income. 170a; 208a. As described above, Discover has likewise raised its fees, after anti-steering rules doomed its efforts to gain market share by competing on price.

The Second Circuit pointed to increased charge volume to claim it evidences competition, but the increased volume provides further evidence of Amex's antitrust violation. 52a. Charge volume is certainly increasing, as more transactions occur in settings where credit cards supplant cash, such as Internet shopping or using "mobile pay" apps. But in a competitive market, merchants' prices would decline *on a per-transaction basis* as volume increases; that merchants' prices have nonetheless

steadily increased indicates that competition is being suppressed. Moreover, it would be particularly wrong to infer price competition from customers' expanded charge volume because Amex's anti-steering rules ensure that a cardholder's decision to use an Amex card cannot be based on whether it charges merchants a competitive price. 195a-196a. Cardholders are ignorant of the cost merchants pay to accept Amex, so they have no incentive to use their Amex cards less.

Consumers are also harmed by these rules. Cardholders are deprived of the right, as economic actors, to decide for themselves whether the benefit of rewards is worth increased prices. And all consumers pay higher retail prices. 68a, 127a, 210a-212a. Worse, only certain customers receive cardholder benefits in return for those higher prices at checkout. Many others receive nothing: "a lower income shopper who pays his or her groceries with cash or through [food stamps]... is subsidizing, for example, the cost of the premium rewards conferred by American Express on its relatively small, affluent cardholder base." 211a-212a.

Nor is there evidence that removing these anticompetitive restraints would harm consumers or destroy Amex's business. The district court found that Amex's "dire prediction of how business will be impacted" by removing the anti-steering rules is "not supported" by the evidence—even after seven weeks of testimony. 241a. Amex had every opportunity to put on its case, but it could find no such evidence. No "expert testimony." No "financial analysis." No direct evidence at all that Amex will be "unable to

adapt its business to a more competitive market." 242a.

In reality, Amex's warnings thinly repackage long-failed arguments that price competition cannot be tolerated in one segment of the economy or another. This Court has repeatedly rejected such claims of "ruinous competition" as a matter of law, and history has not born them out as a matter of fact:

> The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.... The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.

Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 695; *see also NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 116-17 (1984). In other words, we trust competition—not its suppression—to allocate benefits in the economy.

More likely, if the district court's ruling were restored, price competition would force Amex to provide *more* value to consumers to "increase cardholders insistence" on using their Amex cards and willingness to decline merchants' invitations to use a lower cost card. 245a. Indeed, RLC's members recognize and understand that their customers—including Amex cardholders—may prefer one form of payment for reasons personal to them, such as consolidating business spending, tracking their personal spending budget, or maximizing rewards. Accordingly, as they do with all customer interactions, RLC members will carefully analyze expected cardholder responses in deciding "whether and how much to steer." 247a.

The district court's injunction would inject much-needed price competition to curb ever-escalating card acceptance costs, to the benefit of the entire retail economy.

II. THE COURT OF APPEALS' DECISION DISTORTS FUNDAMENTAL ANTITRUST PRINCIPLES AND HAS GRAVE IMPLICATIONS FOR "NEW ECONOMY" ENTERPRISES

The Court of Appeals did not disturb the district court's copious factual findings that Amex used its anti-steering rules to impede merchants' ability to foster competition, resulting in higher prices on merchants and consumers alike. Yet the panel found that the government failed to prove "net harm . . . to both cardholders and merchants." 54a. At points the decision implied that the burden on the government was higher still: "Plaintiffs' initial burden was to

show that the [anti-steering rules] made *all* Amex consumers on both sides of the platform—i.e., both merchants and cardholders—worse off overall." 51a (emphasis added).

That Amex operates a "two-sided" platform is not unprecedented or even unusual: many businesses, from legacy companies like newspapers and television markets, to newer companies like Google, Facebook, Uber, and Airbnb, have two interdependent customer bases. Yet this Court has never given a dominant actor carte blanche to extract supra-competitive pricing from one group of consumers so long as another group benefits. That error itself would warrant certiorari, but it is compounded by the additional holding that—to make even a *prima facia* case—a Rule of Reason plaintiff must affirmatively foreclose the possibility that benefits enjoyed by some consumers outweigh the supra-competitive prices imposed on others.

A. The Second Circuit Distorted Antitrust Principles by Allowing Benefits to Cardholders to Immunize the Harms to Merchants

The decision of the court of appeals conflicts with fundamental antitrust principles. Never has this Court upheld a rule that is explicitly designed to suppress horizontal price competition in services offered to some consumers —and, in fact, successfully suppresses that competition—on the basis that less competition makes it easier for a business to finance its efforts to attract a different set of customers. In fact, antitrust law establishes the opposite. As this Court has recognized, given courts' "inability to

weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector," antitrust law scorns "the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609-10 (1972).

The Sherman Act does not trust private actors—any more than courts—to decide whether horizontal price competition must suffer in one area so that another can allegedly benefit. "[T]he freedom to compete . . . cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy." *Id.* at 610.[4]

This Court recognized as much long ago, in evaluating a competitive restraint affecting another two-sided platform—newspapers. Newspapers must have advertisers and readers, but "dominance in the advertising market, *not in readership*, must be *decisive* in gauging the legality" of a restraint affecting competition for advertisers. *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594,

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[4] To be sure, *Topco* involved a horizontal conspiracy. 405 U.S. at 608. But its refusal to allow the relative societal value of competition in different sectors to be decided by private contract applies with no less force here, where a vertical restraint has eliminated horizontal interbrand price competition as effectively as an agreement between rivals.

610 (1953) (emphasis added). Nowhere in *Times-Picayune* did this Court suggest that the government's proof might fail at the first stage of the Rule of Reason because it did not balance the effect of the challenged restraint on advertisers against the supposed benefits to readers.

In sum, antitrust law does not entertain the rob-Peter-to-pay-Paul inquiry embraced by the Second Circuit. It does not tolerate contractual rules that restrain competition on the theory that the inflated prices paid by some consumers are used to fund products that others will find more attractive.

Yet that was precisely the rationale upon which the Second Circuit rested its decision to reverse the district court, without even remanding to allow the government the opportunity to satisfy its newfangled revision of Rule of Reason test. The Second Circuit's opinion thus conflicts with fundamental antitrust principles: it requires merchants (and all their customers) to bear inflated pricing caused by rules protecting all networks from price competition, so that cardholders can enjoy rewards. It blessed the inflated prices that admittedly result from anti-steering rules even though Amex *admitted* that it pockets a portion of the "gains from increased merchant fees" and does not pass them "along to cardholders in the form of rewards." 51a; *see also* 290a (Amex's anticompetitive pricing "resulted in a higher net price" to consumers and merchants). Antitrust law does not allow Amex to decide—on behalf of all Americans—that price competition for merchant fees would represent too great a threat to its efforts to compete for cardholders.

The Second Circuit's approach also sets an unworkable framework. The harm to consumers here includes being deprived of the right to learn of the costs of Amex acceptance and use a different card instead. Consumers are thus actively impeded from balancing the value of rewards against higher prices at checkout—making it nigh impossible to quantify the supposed net procompetitive benefits the court of appeals surmised into existence. It is futile to search for some workable common denominator that could convert the harm to merchants, the alleged benefits to cardholders, and the higher prices paid by all retail customers into one net value for our economy, be it negative or positive. As the district court found, Amex was not able to credibly do that at trial. 182a-184a. It prevailed on appeal only because the circuit court shifted the burden of that standard-less inquiry to the government.

B. The Second Circuit's Decision Has Grave Implications for Antitrust Cases Against "New Economy" Companies

Given the size and the significance of payment card transactions to our economy, this case would warrant certiorari even if its effects stopped there. If left to stand, however, the decision of the court of appeals threatens to derail antitrust jurisprudence across broad swaths of the economy. Like credit card networks, many "new economy" companies are platforms that seek to attract two sets of interdependent customers. Google and Facebook, for example, must attract users and advertisers. Uber

needs to attract drivers and customers. Airbnb has to attract hosts and guests.

The business models of Google and Facebook are analogous to the model long used by newspapers, where payments from advertisers fund services for users. Like the Times-Picayune, Google and Facebook see both users/readers and advertisers as their customers. By the court of appeals' reasoning, those companies could impose anti-competitive rules on advertisers so long as those rules funded improved services for users. Take, for example, a contract term requiring Facebook advertisers to advertise only on Facebook and not on the site of any Facebook competitor (Twitter, Instagram, etc.). This vertical restraint would be subject to the Rule of Reason. But even if the government adduced ample evidence that competition was being squelched and innovative start-ups were failing because they were starved of advertising dollars, the Second Circuit's standard would permit the restraint unless the government could also prove that Facebook's rule harmed users. Facebook's anti-competitive rule would evade all scrutiny, and it would have no burden to prove anything. And, indeed, because companies like Facebook and Google are so essential to advertisers—far more than the city newspaper in *Times-Picayune*—the court of appeals' decision threatens acute harm to competition among Internet-based companies. The potential of new economy companies to create ever larger and more indispensable two-sided platforms makes ensuring that those frameworks cannot evade antitrust scrutiny more important than ever.

Moreover, to the extent the Second Circuit's decision relied on the "chicken and egg" problem in the credit card industry—where network effects create barriers to entry—the decision has implications for many "sharing economy" businesses. 17a-18a; *see also* 154a. Companies like Uber and Airbnb also face a "chicken and egg" problem: potential ride-share drivers will not sign up unless they will find riders, and riders will not sign up for an app unless it is likely there will be an available driver. The same is true of Airbnb hosts and guests. 17a. Will these companies rely on the Second Circuit's opinion to evade antitrust challenges?

Finally, the Second Circuit's erroneous determination that "[c]ardholder insistence" is irrelevant to a "finding of market power" also has grave antitrust implications. Facebook, another two-sided platform, has profited because of its customers' "insistence" on using the social media website to communicate with friends, with some reports indicating that its users spend nearly an hour daily on the site.[5] Google, too, has a large volume of loyal customers who perform dozens of web searches daily on its platform. Because of that customer "insistence," Facebook and Google have significant market power in the other part of their

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[5] James B. Stewart, May 5, 2016, *Facebook Has 50 Minutes of Your Time Each Day. It Wants More, available at*
https://www.nytimes.com/2016/05/06/business/facebook-bends-the-rules-of-audience-engagement-to-its-advantage.html.

two-sided platforms, *i.e.* in negotiating with advertisers. To discount that power, even in the face of supra-competitive effects, simply because it results from "customer loyalty" has no basis in antitrust jurisprudence. Indeed, in traditional markets, market power *often* results from a company's ability to "attract customer loyalty"—take, for example, Coca-Cola's market power, which stems from customers preferring its product to competitors like RC Cola.[6] And, as detailed above, Amex cardholders are loyal, in part, because they are deprived of the opportunity to choose whether to accept a merchant's offer to forego their Amex cards.

Because the Second Circuit's decision contravenes longstanding antitrust jurisprudence, certiorari is warranted.

III. BECAUSE CREDIT CARD LITIGATION IS CONCENTRATED IN THE SECOND CIRCUIT, THIS COURT'S REVIEW IS NEEDED TO PREVENT THE COURT OF APPEALS' ERRONEOUS DECISION IN THIS CASE FROM EFFECTIVELY BECOMING LAW OF THE LAND

Under the rules governing multidistrict litigation (MDL), credit card antitrust litigation has been clustered in the Second Circuit. As a result, future merchant challenges to Amex's credit card pricing

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[6] That customer preference can cause market power is not unlawful or even disfavored. The key point here is that even lawfully acquired market power can be unlawfully abused through subsequent, anticompetitive conduct.

would likely be venued in the Second Circuit. Because it is unlikely any other Circuit will have the opportunity to weigh in on the legality of Amex's anti-steering rules, certiorari should be granted. Without this Court's review, the court of appeals' erroneous decision could effectively become the law of the land and bind merchants in every state.

Because of MDL transfers, virtually all antitrust litigation against the major credit card networks is pending in courts within the Second Circuit. Other than cases brought by the United States, which are not subject to MDL procedures, individual and class action antitrust challenges to Amex's merchant restrictions are collected in MDL 2221, pending before the Eastern District of New York.[7] Similarly, the initial transfer order in MDL 1720 collected 14 antitrust actions against Visa and Mastercard in the Eastern District of New York; as of late last fall, that proceeding encompassed over 90 such actions.[8] Any future merchant anti-trust challenges to credit cards' anticompetitive practices will almost certainly be venued in the Second Circuit.

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[7] *In re Am. Express Anti-Steering Rules Antitrust Litig.*, MDL No. 2221, 764 F. Supp. 2d 1343 (J.P.M.L. 2011); *see also In re Am. Express Anti-Steering Rules Antitrust Litig.*, MDL No. 2221, ECF No. 57 (E.D.N.Y. Nov. 5, 2015) (order appointing counsel, noting pendency of multiple class actions).

[8] *In re Payment Card Interchange Fee and Merch. Discount Antitrust Litig.*, MDL No. 1720, 398 F. Supp. 2d 1356 (J.P.M.L. 2005); *id.*, 2016 WL 6819020 (J.P.M.L. Oct. 3, 2016).

Commentators have noted the potential risks of concentrating important legal questions in a single court, without the "opportunities for dialogue" among the courts of appeals that "can serve to tease out nuance that might otherwise go undetected." Joseph W. Mead & Nicholas A. Fromherz, *Choosing A Court to Review the Executive*, 67 Admin. L. Rev. 1, 33 (Winter 2015). Protecting against that risk militates further in favor of this Court's review, particularly given the importance of the federal question at issue and the impact on the national economy.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioners' petition for a writ of *certiorari*.

Respectfully submitted,

DEBRA L. GREENBERGER
Counsel of Record
EMERY CELLI BRINCKERHOFF
& ABADY LLP
600 Fifth Avenue, 10th Floor
New York, New York 10020
(212) 763-5000
dgreenberger@ecbalaw.com

DEBORAH WHITE
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street, Suite 2250
Arlington, VA 22209

Attorneys for Amicus Curiae

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v.

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICUS CURIAE* SOUTHWEST AIRLINES CO. IN SUPPORT OF PETITIONERS

RUSSELL S. POST
Counsel of Record
BECK REDDEN LLP
1221 McKinney, Suite 4500
Houston, TX 77010
(713) 951-3700
rpost@beckredden.com

Counsel for Amicus Curiae Southwest Airlines Co.

July 6, 2017

COCKLE LEGAL BRIEFS (800) 225-6964

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INTEREST OF *AMICUS CURIAE*[1]

Southwest Airlines Co. ("Southwest") carries more domestic airline passengers than any other airline in the United States. It has built its business by driving prices downward and capacity upward. Southwest not only offers lower fares but also forces its competitors to lower their fares in response. As a result, the pro-competitive effects of Southwest's entry are enjoyed by all customers of air travel.

As a low-cost air carrier, Southwest's business model and success depend on its ability to reduce expenses. Southwest has been able to reduce expenses by availing itself of competitive market forces that require suppliers to compete for Southwest's business. Southwest is able to reward suppliers that compete on price and quality with greater sales.

Unfortunately, one area of services has insulated itself from such competitive market forces: credit card services. For this reason, Southwest served as a source of factual information during the proceedings below to illustrate the real-world impact of American Express ("Amex") merchant restraints.

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[1] No party's counsel authored any part of this brief. No party or party's counsel contributed money to fund preparing or submitting this brief. No persons or entities other than the *amicus* or its counsel contributed money that was intended to fund preparing or submitting the brief. Counsel of record received 10-days' notice of the intent to file this brief. Consent to file this brief was granted by all parties.

Some of the more significant costs incurred by Southwest are the fees it pays to credit card issuers. The overwhelming majority of airline tickets are purchased with credit cards. This means that Southwest – and its customers – are particularly exposed to the supra-competitive prices charged by credit card networks.[2]

Due to Amex's merchant restraints, Southwest is barred from rewarding networks who competitively price credit card services with greater sales. Insulated from such normal market forces, the prices for credit card services, and those of Amex in particular, have risen dramatically even as the cost of providing such services has decreased. The decision below perpetuates this broken market by insulating Amex from having to compete for merchant business. This results in hundreds of millions (if not billions) of dollars in excess costs incurred by Southwest, other merchants, and their customers. When Southwest's costs increase, its fares increase as well, which in turn increases the prices paid not only by Southwest customers, but also by customers on competing airlines who may elect not

[2] The trial record reflects, for example, that Southwest paid approximately $353 million in credit card fees in 2011. Of those fees, Amex represented approximately $112 million. The record reflects that Amex consistently has far and away the highest cost of payment compared to its competitors. Southwest's payments to Amex have increased dramatically over time, both in raw dollar volume and in terms of discount rate, even as the cost of providing credit card merchant services has decreased.

to compete with the lower fares that would be offered by Southwest.

Southwest has an interest in competing in a market free of the anticompetitive restraints posed by Amex's merchant restraints. When these restraints are in force, credit card issuers like Amex are free to increase their prices and need not engage in meaningful negotiations about those prices. Without such restrictions, credit card issuers like Amex are required to compete for business – for example, by offering substantial price concessions in exchange for a commitment not to pit Amex against other credit card networks at the point of sale. In short, if the merchant restraints did not insulate Amex from normal market demands, Amex would be required to actually compete.

Simply put, merchant restraints lead to higher prices, less output, and fewer alternatives. Southwest has an interest in seeing them eliminated.

STATEMENT OF THE CASE

As the district court found, in a normal competitive market "[m]erchants routinely attempt to influence customers' purchasing decisions, whether by placing a particular brand of cereal at eye level, discounting last year's fashion inventory, or offering promotions such as 'buy one, get one free.'" Pet. App. 67a. But the district court further found that Amex's anti-steering provisions cause this dynamic to be "absent in the credit card industry." *Id.*

With that background, the court properly concluded that the "'market is broken' because the GPCC [general purpose credit and charge] networks do not compete on the basis of merchant pricing." Pet. App. 198a. Simply stated, the person who decides what product to use (the customer) is not the person who directly pays the costs of that decision (the merchant). Amex competes not by offering more favorable prices or terms to merchants, but by offering inducements to cardholders to use higher-priced cards. Amex's merchant restraints – including its anti-steering rules – are designed to maintain that separation, insulating Amex from competing on prices charged to merchants. *Id.* 197a.

The district court determined that Amex's anti-steering provisions "vitiat[e] an important source of downward pressure on Defendants' merchant pricing, and result[] in higher . . . prices across the network services market." *Id.* 196a. The court also found that "inflated merchant discount rates are passed on to all customers – Amex cardholders and non-cardholders alike – in the form of higher retail prices." *Id.* 210a-211a.

These findings were supported in part by the testimony of Southwest Director of Payment Strategies Christopher Priebe, who was subpoenaed by the Government to testify at trial. Mr. Priebe testified that Southwest does not have a practical business alternative to purchasing credit card services offered by the major networks, especially Amex. Amex is second (behind Visa) in annual charge volume with Southwest,

but it wields a unique amount of market power and does so aggressively. The trial record reflects that payments via Amex represented roughly one-fourth of Southwest's customer revenue. Southwest's payments to Amex dramatically increased over time, both in raw dollar volume and as expressed in terms of discount rate, the percentage of each charge owed to the card network. In other words, Amex's price to Southwest has steadily increased relative to its competitors despite Southwest's Amex charge volume increasing dramatically. This outcome is the opposite of what occurs in a properly functioning market where discounts or other benefits are provided for increased purchase volumes.

Amex attracts cardholders by offering benefits such as reward points and other cardholder perks. Amex claims it attracts high-value customers by offering its customers greater inducements, which they perceive as free – when in fact the rewards granted to Amex card members come at the expense of higher fares for all consumers. Amex can do this because merchants, with rare exceptions, have no economic ability to refuse Amex's terms. The trial record shows that Amex actually measures this market power and calls it "cardholder insistence."

Amex uses that insistence to threaten to turn consumers away from merchants who try to inject competition into the credit card market or even inform their own customers as to the relative prices of various payment forms. As Mr. Priebe testified, Southwest is forced to consent to Amex's supra-competitive price

increases because it does not have the practical business alternative of not purchasing from Amex. Thus, because Southwest and other merchants cannot refuse to purchase card services from Amex, Amex is able to essentially impose contract terms, including the merchant restraints, at will.

Amex's merchant restraints are an important, if not essential, tool for Amex to protect itself from horizontal inter-brand price competition. Without them, customers of Southwest (and other merchants) could decide to use less-expensive cards or non-card payment methods, and could even receive economic incentives from merchants to do so. Mr. Priebe testified that if Southwest were permitted to educate and incentivize its own customers to make informed payment choices, it would consider offering customers an incentive for using alternate, less expensive payment methods, such as Rapid Rewards points (the currency for Southwest's loyalty program). Any given customer would therefore be able to choose between using Amex (and receiving the Amex rewards) or using the alternate method (and receiving the rewards attached to that method). Customers would be better off by definition: they would be free to choose the more valuable reward for them. Further, merchants could send price signals to customers, making credit card companies compete for merchant business just like every other supplier.

If enough customers chose the Rapid Rewards option, Southwest would materially lower its costs. Consistent with its business philosophy as a low cost carrier, lower costs permit Southwest to lower its fares,

which benefits not only Southwest's customers but also the customers of competing airlines. The history of the American aviation industry also shows that lower costs for Southwest permit it to increase capacity for air passengers in the United States, thereby generating more passengers on more routes. A fully-informed choice to pay with an alternate method and receive a different reward would also inherently increase consumer satisfaction, the very justification Amex offers for its own rewards program. Again, all of this would result from a simple and inherently pro-consumer choice of payment and reward options in a properly functioning market.

Amex's merchant restraints bar Southwest from offering this choice or even communicating with its own customers about such a choice. Instead, merchants like Southwest are prevented from offering alternative payment options to customers who state an initial desire to pay with Amex, and are barred from even providing customers truthful information about the costs of various cards and the effect of those costs on prices. Simply put, the merchant restraints are designed to, and do, insulate Amex from price and quality competition. Based on evidence like this from Southwest and other market participants, the district court entered an injunction that enabled merchants to steer consumers to lower cost forms of payment and to use the prospect of steering to negotiate lower rates with card issuers. Pet. App. 298a-300a, 303a-309a.

The Second Circuit panel reversed and remanded with an instruction to find in favor of Amex. Notably,

the panel did not set aside the findings described above as clearly erroneous; rather, it determined that the government had not properly defined and proven harm in a single "market" that includes both network services purchased by merchants and cardholder services purchased by consumers. *See id.* 49a-51a ("Here, the market as a whole includes both cardholders and merchants" and "the Plaintiffs' initial burden was to show that NDPs made all Amex consumers on both sides of the platform – i.e., both merchants and cardholders – worse off overall.").

SUMMARY OF THE ARGUMENT

Certiorari should be granted for two reasons.

1. The panel's decision is in direct tension with this Court's precedents (a) establishing that each side of a two-sided platform is a separate product market and (b) defining relevant product markets. No less an authority on antitrust law than Professor Hovenkamp has criticized the decision as "incorrect."

2. Whether a market participant can impose anticompetitive restraints on customers in one market in order to gain an advantage over customers in another market is a question of exceptional importance that impacts millions of U.S. consumers. This Court should have the last word on this important issue of federal antitrust law.

ARGUMENT

I. The panel's decision conflicts with relevant decisions from this Court.

In two ways, the panel "decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c).

First, the panel held that the relevant antitrust market consists of services on both sides of a "two-sided market" involving "both merchants and cardholders." Pet. App. 49a-50a. This decision conflicts with this Court's longstanding precedent that each side of a two-sided platform constitutes a separate product market. *See, e.g.*, *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 610 (1953) (newspaper's news sales and advertising sales are in "separate though interdependent markets").

As Professor Herbert Hovenkamp explains in his just-released 2017 supplement to his treatise, "the court [in *Amex II*] failed to see . . . that under antitrust policy *competition* should choose the optimal mix of revenue as between the two sides, an issue obfuscated by the incorrect finding that these two elements of revenue were within the same antitrust market." P. Areeda & H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, 2017 Supp. § 562e. Professor Hovenkamp surmises that the appellate panel "was apparently misled by the fact that Amex obtained revenue from sources, merchant fees and consumers, but the fact that a firm obtains its profits from two different, non-substitutable groups

does not serve to place the two groups into the same market." *Id.* § 565.

Second, by holding that the relevant antitrust market included services to both merchants and cardholders, Pet. App. 49a-50a, the panel's decision conflicts with this Court's precedent on how to define the relevant product market. A product market is "determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *accord United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956) (holding that although substitutes need not be identical, they must be "reasonably interchangeable by consumers for the same purposes" to be included in the same product market). While the panel decision combined these markets, it was wrong to do so. It is undisputed that the services and inducements Amex offers to its cardholder consumers are not reasonably interchangeable with the services, prices, and terms that Amex offers to merchant consumers.

II. The panel decided an important question of federal law that has not been, but should be, settled by this Court.

In addition, the panel's decision involves the exceptionally important question of whether a market participant can impose anticompetitive restraints on one set of customers in one market in order to gain an advantage over customers in another market. This is

"an important question of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c). The answer to this question affects tens (and perhaps hundreds) of millions of consumers. This Court should have the last word on this issue.

The district court found that Amex's anti-steering provisions were anticompetitive restraints on merchants, and that finding is not clearly erroneous. Amex's merchant restraints destroy the price signals between sellers and buyers that would otherwise exist in a competitive market. Specifically, the merchant restraints prevent merchants from communicating price signals to consumers. Thus, the panel's decision permits Amex to use anticompetitive restraints to extract supra-competitive prices in one market while growing its market power (which it calls "insistence") in another.

The panel's decision also implicates another exceptionally important question of antitrust law: how the rule of reason applies in two-sided transactions. Although it is highly doubtful that the Amex platform even constitutes a two-sided market (because merchants do not gain from increased output on the cardholder side of the market, as such growth is actually to their detriment), the panel's decision suggests the proper analysis is to compare the costs of anticompetitive restraints on one side with the gains on the other. Pet. App. 49a-53a. But that approach is unworkable as courts would have to pick winners and losers among different economic actors, would have to find a way to compare anticompetitive burdens on one side (such as

merchant fees) with effects on the other (such as cardholder costs and benefits), and would have to determine how much of the anticompetitive costs must be transferred from one set of customers to the other to make the restraint lawful. This Court should not permit such an unworkable rule to gain traction in the federal courts.

Amex correctly told the Second Circuit in a separate lawsuit that comparisons like these cannot be made.[3] Lower courts would have to compare the apples of anticompetitive costs with the oranges of inducements to cardholders, but without any guidance about how to determine if the oranges outweigh the apples. This is not the hallmark of a rule that will stand the test of time.

Finally, the great importance of this issue is underscored by its impact on innovation. The district court found that Amex's anti-steering rules cause a "stunting [of] innovation" in the market for payment networks: "anti-steering rules . . . are responsible for inhibiting the development of several proposed merchant-owned payment solutions," including the MCX system in which Southwest was a participant. Pet. App. 213a. In short, the development of competitive low-cost payment solutions is restrained by Amex's merchant restraints because those restraints restrict

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[3] *See* Br. *Amicus Curiae* of American Express in Supp. of Affirmance at 6, *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003) (No. 02-6074), available at 2002 WL 32828497 (stating that "no amount of [card] issuer competition can eliminate" the anticompetitive effects at the network level).

merchants from offering those alternatives to customers on more attractive terms (i.e., lower price).

CONCLUSION

Southwest respectfully submits that certiorari should be granted.

July 6, 2017

Respectfully submitted,

RUSSELL S. POST
Counsel of Record
BECK REDDEN LLP
1221 McKinney, Suite 4500
Houston, TX 77010
(713) 951-3700
rpost@beckredden.com

Counsel for Amicus Curiae
Southwest Airlines Co.

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No. 16-1454

IN THE

Supreme Court of the United States

STATE OF OHIO, ET AL.

Petitioners,

v.

AMERICAN EXPRESS COMPANY & AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF 25 PROFESSORS OF ANTITRUST LAW AS *AMICI CURIAE* SUPPORTING PETITIONERS

ERIC F. CITRON
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICI*[1]

Amici are 25 antitrust scholars who write to share with the Court their disinterested perspective as those who study the doctrine. Their respective credentials are compiled in the attached addendum, but it suffices to note that they include many leaders in the field, including the author of the treatise most often relied upon in this Court's antitrust decisions. *See, e.g.*, *Kimble v. Marvel Entm't*, 135 S. Ct. 2401, 2415 (2015) (Alito, J. dissenting); *FTC v. Actavis*, 133 S. Ct. 2223, 2227 (2013); *Comcast v. Behrend*, 133 S. Ct. 1426, 1437 (2013) (Ginsburg & Breyer, JJ. dissenting); *Kirtsaeng v. John Wiley & Sons*, 133 S. Ct. 1351, 1363 (2013); *Pac. Bell Tel. Co. v. Linkline Commc'ns Inc.*, 555 U.S. 438, 453 (2009); *Leegin Creative Prods. Inc. v. PSKS*, 551 U.S. 877, 894 (2007) (all citing P. Areeda & H. Hovenkamp, *Antitrust Law* ("Areeda & Hovenkamp")).

Amici strongly believe that the decision below is sufficiently important and sufficiently out of step with contemporary antitrust doctrine that this Court should grant certiorari to reconsider immediately the Second Circuit's approach. Left alone, the decision below will warp proper antitrust analysis going forward, subjecting parties to difficult and expensive discovery into questions that lack an intelligible answer under basic principles of antitrust law and economics, and leading the lower courts into confusing

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[1] No party's counsel authored this brief in whole or in part and no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. All counsel of record received timely notice of *amici's* intent to file this brief, and all parties consented to the filing.

and unproductive inquiries that will only sow greater confusion into a difficult area of law.

Simply put, this case represents a critical opportunity for the Court to clarify the appropriate application of the Rule of Reason in cases where the defendant claims to inhabit a "two-sided market," and the Court should take it. It will find that special rules like the Second Circuit's are unnecessary: So-called two-sided markets may be of growing importance in the modern economy, but they are nothing new, and ordinary antitrust principles still clearly dictate the right approach. *Amici* thus strongly believe that, to ensure that antitrust doctrine does not evolve in fundamentally unsound directions, the Second Circuit's errant approach should be weeded out before it takes root. The Court should grant certiorari, and reverse.

SUMMARY OF ARGUMENT

After an extensive trial, the district court in this case correctly held that the Non-Discrimination Provisions (NDPs) imposed on merchants by American Express (Amex) violate the Sherman Act under the Rule of Reason because they eliminate horizontal price competition between the four credit card networks for the sale of services to merchants—"dramatically" increasing the prices merchants pay to accept credit cards. The Second Circuit nonetheless reversed. It held that the plaintiffs failed to make a *prima facie* case under the Rule of Reason because they had not shown that the injury to merchants in their market for credit-card services outweighed any potential procompetitive effects in the market where card companies compete to obtain cardholders. The court

justified this holding by concluding that both merchants and card members consume Amex's credit-card services in a "two-sided market," and that the plaintiffs thus had to show a "net" anticompetitive effect embracing both sides of the platform to make out a *prima facie* case.

That holding raises two fundamental questions regarding the proper application of the Rule of Reason, and answers both incorrectly. First, it raises the question of what constitutes a *prima facie* showing of an adverse effect on competition, sufficient to shift the burden to the defendant to come forward with evidence of a procompetitive justification for its conduct. *See, e.g.*, *Actavis*, 133 S. Ct. at 2236; *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 788, 792 (1999) (Breyer, J., concurring in part); *infra* pp.13-15 (explaining recognized burden-shifting framework). The plaintiffs demonstrated that Amex's NDPs obstructed price competition by preventing merchants from either communicating true cost information to consumers or granting them price discounts or other benefits for using lower-cost payment cards. But the Second Circuit believed that, because Amex *might* use the revenue from its elevated merchant prices to grant reward points (*i.e.*, discounts) to its cardholders, and that potential benefit to competition for cardholders *might* offset the injury to price competition in the sale of services to merchants, the plaintiffs had not yet shown "an adverse effect on competition in the relevant market" for purposes of the Rule of Reason's burden-shifting framework.

This holding misses the very point of the burden-shifting, Rule-of-Reason approach. This Court has long held that the protection of price competition is the

paramount goal of the antitrust laws, and that eliminating that competition with respect to any component of price formation is an adverse effect on competition. Even if Amex operates a two-sided platform—a point whose significance is quite misunderstood, as discussed below, *see infra* pp.16-21—the obstruction of price competition in any part of the prices paid is an adverse effect on competition, which must be justified by procompetitive effects to avoid condemnation under the Rule of Reason. Accordingly, the burden was *on Amex* to come forward with evidence of procompetitive effects stemming from its suppression of price competition; the plaintiffs had already done their part.

The second, related question is whether a plaintiff must show a "net" harm to competition, embracing both sides of a two-sided platform, to prevail. The Second Circuit said "yes," but the answer should be no. This Court has considered cases involving so-called "two-sided markets" and never imposed such a requirement.[2] *See, e.g.*, *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984); *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 598, 610 (1953). Contrary to the Second Circuit's view, the very

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[2] A firm that operates a two-sided platform sells different services to two different sets of purchasers. A firm operating such a platform is often referred to as inhabiting a "two-sided market." But "the economic concept of two-sided platforms or markets is not the same as the legal concept of the *relevant market* in antitrust law, a distinction that economists and lawyers alike recognize." *U.S. Airways, Inc. v. Sabre Holdings Corp.*, 2017 WL 1064709, *8 (S.D.N.Y. 2017) (citing Evans and Schmalensee, *The Industrial Organization of Markets with Two-Sided Platforms*, 3 Competition Policy Int'l 151, 153 & n.5 (2007)).

different services that payment card companies offer to merchants and cardholders respectively are not substitute products, and so do not belong in the same relevant market from the standpoint of antitrust law and economics. Treating products that cannot be substituted for each other as part of one relevant market is not even intelligible; it prevents the relevant-market inquiry from accurately answering the questions for which it is asked. And, relatedly, netting harms among different consumers buying different products in different relevant markets essentially inverts a core premise of antitrust law—namely, that so long as price signals are not distorted by anticompetitive behavior, the efficient allocation of resources is best achieved by the free market itself, not judicial balancing.

The Second Circuit's approach to these issues conflicts with rulings of this Court and fundamental antitrust principles. Given the importance of this case and the increasing importance in the modern economy of firms operating two-sided platforms, the Second Circuit opinion presents a significant threat to effective antitrust enforcement and to the sound development of antitrust doctrine. In fact, because the special "two-sided market" rules and netting analysis called for by the Second Circuit are so hard to fit within existing law, the only result of leaving the decision in place will be to damage the doctrine and the development of proper antitrust analysis going forward. The interim effect will be to put parties and courts through expensive and unproductive inquiries, while doing potentially irremediable harm to a set of legal principles that are already difficult for some courts to accurately apply. In this particular instance,

amici believe that it is essential that the Court act swiftly to clarify the doctrine and avoid deepening confusion on these important issues.

BACKGROUND

I. The Conduct At Issue

Merchants who purchase Amex credit card services account for approximately 95% of all retail sales in America. Each of those merchants enters into an agreement with Amex that contains Amex's NDPs. The NDPs prohibit merchants from using price discounts or any other inducement to influence a consumer to use a payment card that charges the merchant a lower fee than Amex. Pet. App. 19a-20a, 94a-96a, 100a-101a. The NDPs also prohibit any Amex-accepting merchant from conveying its own preference for alternative credit cards or debit cards—which cost much less to accept. Merchants cannot even truthfully advise consumers that Amex charges them more than other networks, and that the merchant increases its retail prices to cover the added expense. Pet. App. 91a-96a. These provisions are, essentially, a vastly more restrictive form of the anti-surcharging laws this Court recently considered in *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017), creating commensurately more dramatic effects on effective price competition.

II. The District Court's Findings

After a long trial involving voluminous evidence and expert testimony, the district court found that Amex's NDPs (1) obstruct price competition between Amex, Visa, MasterCard and Discover for the sale of credit-card services to merchants (Pet. App. 23a-24a, 71a, 191a-200a), and (2) increase "dramatically" the

prices merchants pay to all four networks. Pet. App. 71a; *see also id.* 68a, 195a-196a, 203a, 240a-241a. The district court also found that merchants increase their retail prices to cover the elevated credit-card fees, meaning that *all* consumers pay higher retail prices because of Amex's anticompetitive behavior. Pet. App. 68a, 191a-193a, 210a-212a, 221a n.46.

More specifically, the district court found that, if merchants could steer consumers to lower-cost credit cards by offering them lower prices or discounts, then consumers would switch to the lower-cost cards and the higher-priced cards would lose market share (Pet. App. 192a, 195a-197a, 217a-219a, 227a-228a)—as should happen in a competitive market. The NDPs prevent that price competition, however, because they eliminate any competitive incentive a card network would have to cut prices to merchants, who have no power to reward lower-cost networks with more charge volume at the register. In the district court's words "the NDPs short-circuit the ordinary price-setting mechanism in the network services market by removing the competitive 'reward' for networks offering merchants a lower price for acceptance services." Pet. App. 71a. And the result is higher prices charged not only by Amex, but by all the networks. Pet. App. 192a.

III. The Decision Below

The Second Circuit did not overturn any of the district court's factfinding. It nonetheless reversed the ruling that Amex had violated the Sherman Act under the Rule of Reason. It reasoned that the proven restraint on price competition in the market for services to merchants did not constitute a *prima facie* showing of an adverse effect on competition because

supracompetitive merchant prices might be used to increase the rewards that Amex gives to cardholders. Pet. App. 39a-40a, 43a-44a, 49a-54a. Holding that the injury to "merchant pricing is only one half of the pertinent equation," it ruled that a *prima facie* case of an adverse effect on competition would require *the plaintiffs* to show that higher merchant fees were not offset by higher cardholder rewards and that the "net" two-sided price had gone up. Pet. App. 44a, 49a-50a, 51a-52a ("Plaintiffs' initial burden was to show that the NDPs made all Amex consumers on both sides of the platform—*i.e.*, both merchants and cardholders—worse off overall.").

Notably, the Court of Appeals did not find that Amex had presented evidence of a procompetitive justification for the injury its NDPs cause to merchant price competition. Nor did it find that Amex had in fact increased rewards to cardholders by as much as it increased prices to the merchants.[3] Instead, the Second Circuit held that under the Rule of Reason, Amex had no obligation to present evidence of

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[3] Amex admitted "that not all of [its] gains from increased merchant fees are passed along to cardholders in the form of rewards." Pet. App. 51a. In fact, as the district court found, part of the increase "drops to [Amex's] bottom line," and Amex "spends less than half of its discount fees it collects from merchants on cardholder rewards." Pet. App. 209a-210a. But that is not the key point: Even if Amex passed on to cardholders all the excess revenue it collects from merchants, that would not constitute an efficient net price. Merchants pass the added Amex fees on to all their customers, including those who do not use Amex cards. Those customers, in effect, pay higher retail prices to cover the cost of rewards that go only to Amex cardholders. There is nothing efficient about person A paying for rewards that go only to person B.

procompetitive effects because the plaintiffs had failed to meet their initial burden of showing that competition had been injured, on balance, for both sets of Amex's customers—what it described as "the relevant market 'as a whole.'" Pet. App. 51a-52a.

This followed from the court's conclusion that the relevant market for evaluating Amex's conduct had to include the services sold by Amex to *both* merchants and cardholders and that the district court thus erred by finding a relevant market for (and anticompetitive effect in) the sale of network services to merchants alone. Pet. App. 32a-33a. Having defined the market that way, the court required the plaintiffs to prove that the injury to price competition on the merchant side of the platform was not outweighed by any hypothetical benefit to competition on the cardholder side. Pet. App. 43a-44a, 49a-54a. Absent this "net" injury, there would be no violation. *Id.*

REASONS FOR GRANTING THE WRIT

The Second Circuit made two critical errors in applying the Rule of Reason to the "two-sided market" it purported to identify below. We begin by explaining those errors, and then turn to the pernicious effects they will have on the development of antitrust doctrine, and the reasons this Court should grant immediate plenary review.

I. Proof Of Adverse Effects On Horizontal Price Competition Must Suffice To Shift The Burden To Defendants To Prove Any Alleged Procompetitive Justifications.

The Second Circuit did not dispute that Amex's NDPs prevent merchants from communicating truthful price information or offering lower prices to

consumers in an effort to reward card networks that offer merchants lower prices for their services. Pet. App. 19a-20a, 23a-24a. Nor did the Second Circuit dispute that Amex's NDPs thus obstruct price competition among all the card networks for the sale of services to merchants. It nonetheless required more—a showing of net harm across both sides of the supposed two-sided market—to make out a *prima facie* case and shift the burden of proving a procompetitive justification for the NDPs' restraint of competition to Amex. That ruling conflicts with fundamental antitrust principles and is very likely to significantly undermine future antitrust enforcement and doctrine.

Most critically, it fails to account for the fundamental place that horizontal price competition occupies in antitrust analysis. This Court has long held that "price is the 'central nervous system' of the economy," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-26 &n.59 (1940), and that the protection of price competition is "an object of special solicitude under the antitrust laws." *United States v. Gen. Motors Corp.*, 384 U.S. 127, 148 (1966). As a result, this Court has found conduct that "tampers with price structures," *Socony*, 310 U.S. at 221, or "chill[s] the vigor of price competition," *United States v. Container Corp. of Am.*, 393 U.S. 333, 337-38 (1969), to be uniquely harmful to competition and contrary to the Sherman Act. Indeed, this Court has held that a restraint that "disrupts the proper functioning of the price-setting mechanism" violates the Rule of Reason "even absent proof that it resulted in higher prices." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 461-62 (1986). This Court has also held that "[a] restraint

that has the effect of reducing the importance of consumer preference in setting price" is inconsistent "with th[e] fundamental goal of antitrust law," *NCAA*, 468 U.S. at 106 & n.30, and that conduct that "impedes the ordinary give and take of the marketplace and substantially deprives the customer of the ability to utilize and compare prices" adversely affects competition. *See Nat'l Soc. of Prof. Eng'rs v. United States*, 435 U.S. 679, 693-94 (1978); *Ind. Fed'n*, 476 U.S. at 459 ("[A]n agreement limiting consumer choice by impeding the 'ordinary give and take of the market place' ... cannot be sustained under the rule of reason[.]"). Notably, this kind of effect is *conceded* here. It makes no sense for a court to require more before shifting the burden and asking a defendant to provide proof that its restraint is necessary to provide procompetitive benefits to the market.

Here, the Amex NDPs prevent merchants from offering customers lower prices or discounts to use a competing, lower-cost payment card. If merchants could do so, many of them would use those steering techniques to incentivize customers to use lower-cost cards and higher-cost cards, such as Amex, would lose market share. Pet App. 192a-195a, 197a, 214a-219a, 227a-228a. If the high-cost cards wanted to stop that loss of sales, they would have to compete on price or quality so as to encourage merchants not to steer customers to other cards. Amex's NDPs tamper with market forces and prevent such competitive conduct from determining the market price. They also deprive retail consumers of both price information and the ability to exercise their preference for a discount or other incentive from a merchant instead of rewards from Amex.

Absent the Second Circuit's special rule for cases involving two-sided platforms, this evidence would have easily sufficed to establish an adverse effect on competition warranting a burden-shift to the defendants. Indeed, the district court so held. Pet. App. 227a-228a. But there is no reason for such a special rule; nothing about the fundamental antitrust analysis should change even if Amex operates a two-sided platform. Contrary to the Second Circuit's holding, the merchant price is not "only one half of the pertinent equation." Pet. App. 44a. That is because the obstruction of price competition on just one "side" of the market would still constitute an adverse effect on competition—it would still cause all the distortions and deleterious effects on free market mechanisms described above.

A close analogy is found in this Court's reasoning in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980). There, the defendants' conduct prevented competition over credit terms, but they argued that their anticompetitive arrangement could still be excused because competition would flow to other aspects of their arrangements with counterparties—including the actual purchase price. This Court nonetheless held that, because credit terms were "an inseparable *part* of price," the agreement among the defendants had to be treated as a restraint on horizontal price competition, and so was unlawful under the Sherman Act. *Id.* at 648 (emphasis added). The same point applies here. Even if Amex operates a two-sided platform and collects a net two-sided price—and even if competition might shift from the merchant terms to the cardmember terms—the merchant price is nonetheless an "inseparable" component of price,

and the elimination of competition with respect to that component has an adverse effect on competition, just as in *Catalano*.

Simply put, proof that Amex's conduct severely disrupted price competition in the sale of network services to merchants clearly should have sufficed to establish a *prima facie* case of an adverse effect on competition under the Rule of Reason. In fact, that is among the most fundamental kinds of anticompetitive effects a plaintiff can show, and the law cannot ask plaintiffs to prove more—at least at the outset of the analysis.

To be sure, the defendant can attempt to prove that the adverse effect on competition is outweighed by offsetting procompetitive effects, but the Second Circuit compounded its error here by placing this burden on the plaintiffs. It did so on the theory that plaintiffs must show "an actual adverse effect on competition *as a whole* in the relevant market,'" and that, "[h]ere, the market *as a whole* includes both cardholders and merchants." Pet. App. 51a-52a, 53a (emphasis original). Apart from the Second Circuit's confusing holding that a special approach to relevant markets is necessary for two-sided platforms, *see infra* pp.16-19, this constitutes a substantial departure from the now-accepted approach to Rule of Reason cases. It thus provides a useful and important opportunity for this Court to clarify the doctrine.

To begin, placing the burden on the plaintiff to identify and disprove the existence of a procompetitive justification conflicts with this Court's decision in *Actavis*. There, while discussing the Rule of Reason and "offsetting or redeeming virtues," this Court made clear that "[a]n antitrust *defendant* may show in the

antitrust proceeding that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason." 133 S. Ct. at 2236 (emphasis added). Requiring that the plaintiff show a "net" anticompetitive effect in the market "as a whole" at the very first step just swallows this approach.

As Justice Breyer similarly explained in *California Dental Association*, "[i]n the usual Sherman Act §1 case, the defendant bears the burden of establishing a procompetitive justification." 526 U.S. at 788 (Breyer, J. concurring in part). As that opinion goes on to explain, the defendant "'alone would have the incentive to introduce such evidence' of procompetitive justification," which "is one of the reasons defendants normally bear the burden of persuasion about redeeming virtues." *Id.*

The leading antitrust treatise adopts the same view and, quite strikingly, explains that it should have been applied *in this very case*. *See* Areeda & Hovenkamp, 2017 Supp., ¶1505, p.171 (stating that proof of a harmful impact on merchant competition established *prima facie* case and "[t]hat burden having been met, the burden should shift to [Amex] to show a justification. ... The defendant, being the author of the restraints, is in a better position to explain why they are profitable and in the consumers' best interests").

Accordingly, placing the burden on plaintiffs to disprove offsetting procompetitive effects before they can make out even a *prima facie* showing of an adverse effect on competition—as the Second Circuit did—fundamentally warps established Rule-of-Reason analysis. The plaintiff should not have to speculate as to what evidence of procompetitive effects a defendant

might offer and then refute that hypothetical evidence to meet its initial burden. Under the Rule of Reason, the burden of coming forward with evidence of offsetting procompetitive effects must be placed on the defendant. It is the defendant who has the incentive to develop and present such evidence and it is the defendant who knows what allegedly procompetitive motivation and expected effects caused it to engage in the challenged conduct. If the plaintiff must initially prove that anticompetitive effects are not outweighed by procompetitive effects, then the burden of presenting evidence of procompetitive effects never shifts to the defendant at all. That result cannot be reconciled with decisions of this Court, sound antitrust policy, or hundreds of cases that have applied the Rule of Reason. *See* Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 B.Y.U. L. Rev. 1265, 1268 (empirical analysis of every Rule-of-Reason case in 22-year period found that "[i]f the plaintiff can demonstrate an anticompetitive effect, the burden shifts to the defendant to demonstrate a legitimate procompetitive justification for the restraint").

In short, the Second Circuit's approach threatens to swallow the typical burden-shifting approach to the Rule of Reason, and to sow deep confusion about the scope of the plaintiff's initial burden. That is particularly so because an adverse effect on horizontal price competition and the price setting mechanism—of the kind shown here—lies at the core of what should suffice for a *prima facie* case. Requiring a plaintiff to go beyond that showing and try to net out offsetting benefits among *other* consumers in its *initial* case has no basis in existing law and will deeply confuse courts seeking to apply the doctrine going forward.

II. Two-sided Platforms Do Not Require Special Rules For Defining Relevant Markets Or "Netting" Competitive Effects.

Prior to the Second Circuit's decision in this case, there was no decision defining a "relevant market" for antitrust purposes to encompass both sides of a two-sided platform, or requiring the netting of competitive effects across both "sides" of that platform. Certainly, *amici* are unaware of any such case, and the Second Circuit cited none. This Court should not allow this doctrinal novelty to persist and grow, because it is far out of step with basic principles of antitrust law.

First, under basic antitrust principles, a relevant product market includes only products or services "that have reasonable interchangeability" of use and exhibit "cross-elasticity of demand between the product itself and substitutes for it." *See United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 394 (1956); *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). The products that Amex sells on the two "sides" of its platform do not exhibit those characteristics in any respect. Merchant services are not substitutes for the card-issuing services that Amex sells to cardholders. Merchants do not buy and have no use for the services sold to cardholders and cardholders do not buy and have no use for the services sold to merchants. There is also no cross-elasticity of demand between the two: A merchant could not switch to purchasing cardholder services in response to an increase in the price of merchant services, and a cardholder could not switch to network services in response to an increase in the price of cardholder services. Far from being substitutes, the two services act more as complementary products and so do not

belong in the same relevant market. Accordingly, the leading treatise concludes, without reservation, that the Court of Appeals clearly misidentified the relevant market below. *See* Areeda & Hovenkamp, 2017 Supp., ¶565, p.104 (Second Circuit "incorrectly conclud[ed] that the relevant market in which to consider American Express's anti-steering rules was not limited to the market for network [merchant] services but also included consumers. ... [T]hose two groupings are not substitutes for one another but rather behave more as complements.").

As the treatise further explains, separate product markets do not become a single relevant market for antitrust purposes simply because one defendant sells both products as parts of the same platform. The Second Circuit "was apparently misled by the fact that Amex obtained revenue from two sources, merchant fees and consumers, but the fact that a firm obtains its profits from two different, non-substitutable groups does not serve to place the two groups into the same relevant market; for example, a magazine might obtain revenue from readers and advertisers, but that does not entail a single 'reader/advertiser' market." Areeda & Hovenkamp, 2017 Supp., ¶565, p.104.

Antitrust scholars have likewise criticized the Second Circuit's holding that a procompetitive effect on cardholder services could be used to offset an adverse effect on competition in the sale of services to merchants, explaining that it is contrary to this Court's settled approach. For example, this Court addressed the question of whether a procompetitive effect in one area of competition could be used to offset an injury to competition in another area in *NCAA*, 468 U.S. at 85. There, this Court held that the defendant

could not justify a restraint on the market for TV broadcasting of college football games by arguing that its conduct had a beneficial effect on the market for live attendance at the game. *Id.* at 115-16; *see* Areeda & Hovenkamp, 2017 Supp., ¶562 at p.102 ("As in *American Express*, revenue came from two different sources ... ticket-paying live attendance ... and advertising-financed televising of those games. The Court held that, under the rule of reason, the NCAA could not justify the television restraint by arguing that it served to encourage more people to attend games rather than watch them on television"). As this Court explained in *United States v. Topco Association, Inc.*, 405 U.S. 596, 609-10 (1972), competition cannot be foreclosed in area to promote greater competition in another because courts have an "inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector."

Notably, this Court expressly confronted a two-sided platform in *Times-Picayune*—which concerned the sale of advertising space by a newspaper—and adopted no special approach of the kind the Second Circuit used. A newspaper is a classic two-sided platform: The paper sells ad space to advertisers on one side of the platform and news reporting to readers on the other side. This Court did not, however, hold that both sides of the two-sided platform had to be placed in the same relevant market or that the anticompetitive effect had to be measured across both sides. To the contrary, this Court held that "every newspaper is a dual trader in *separate* though interdependent markets." *Id.* at 610 (emphasis added). This Court further held that, because the

restraint in question was applied only in one of the two markets, the decisive question was whether the defendant had economic dominance in that market alone. *Id.* In other words, this Court held, in a case where the defendant operated a two-sided platform, that each of the products it sold was in a "separate ... market" and that if the defendant injured competition in the market where the restraint was applied, that violated the Sherman Act. The Second Circuit, however, did not even grapple with *Times-Picayune* in embarking on its novel approach. The resulting analysis is thus incorrect and draws into question fundamental antitrust principles. *See* Areeda & Hovenkamp, 2017 Supp., ¶1505, pp.170-71 (describing as "troubling" the Second Circuit's "conclusion that when a restraint is alleged in a two-sided market, a *prima facie* case requires the plaintiff to allege net harm aggregated across both sides").

What is most troubling, however, is the Second Circuit's holding that Amex should be allowed to use its NDPs to obstruct price competition and keep merchant prices high because "a reduction in revenue that Amex earns from merchants' fees may decrease the optimal level of cardholder benefits." Pet. App. 49a-50a. This evidences a profound misunderstanding of the antitrust laws. Basic antitrust policy requires that "*competition* should choose the optimal mix of revenue between the two sides"—not Amex's obstruction of price competition for the sale of services to merchants. Areeda & Hovenkamp, 2017 Supp., ¶562(e), p.101 (emphasis original). Amex is free to choose the price it wants to charge merchants and the value of the rewards it wants to give cardholders. It should not, however, be free to prevent merchants

from fostering price competition among Amex and its competing card networks and thus benefitting from the lower prices other competing networks might offer if merchants could steer consumers to lower-cost cards. Nor should Amex be free to choose for consumers whether they prefer Amex rewards over the discounts or other inducements merchants might offer them for using the merchants' favored cards. *See* Areeda & Hovenkamp, 2017 Supp., ¶1505, pp.170-71 ("[*C*]*ompetition* is what determines how revenue is assessed with respect to each side. Some card issuers pursue a strategy of obtaining high market fees while offering more generous terms to customers, while others do the opposite. [Amex's] policy effectively made customers indifferent to merchant charges and to the extent those charges could be expected to be higher, restrained competition[.]"). Contrary to the Second Circuit's view, Amex does not have "a legitimate interest" in restricting free market forces. Competition and the interaction of free market forces—not Amex's NDPs—must be allowed to determine the optimal level of both merchant prices and cardholder rewards.

III. The Decision Below Requires This Court's Immediate Review.

Unfortunately, the distorted approach to two-sided platforms and the Rule-of-Reason analysis adopted below is not just an ordinary error of law. *Amex* is a doctrinally important decision from an influential court in this field, and is likely to be followed by others. That influence will not be positive; the case is likely to spread doctrinal confusion that this Court will struggle to correct in any future case.

The core problem is that the Second Circuit's decision calls for evidence and analysis that is not tied to any intelligible antitrust principle, but plaintiffs will nonetheless have to try to engage and produce. Courts confronting arguments about "two-sided markets" in future cases cannot apply the ordinary rule requiring that products be reasonable substitutes when defining relevant markets, but will have to try anyway. Plaintiffs and defendants will thus embark on expensive expert discovery and district courts will render decisions about market definition that make no sense in the context of current doctrine, and then future courts will try to reconcile irreconcilable approaches, and imbed nonsensical rules into the law.

The decision below also threatens to unleash a deeply problematic approach to antitrust with its "netting" principle. As explained above, the proper balance of benefits and harms in the market *comes from competition*, not from judicial balancing. Entertaining voluminous and expensive expert discovery into the "net" effect of challenged restraints on different consumers in different relevant product markets is a pointless errand: It does not answer a question antitrust law should ask. Worse, it threatens to confuse lower courts regarding their mission. The goal is not to ensure that *somebody* benefits from competition; rather, it is to ensure that the challenged restraint is not disrupting competition in *its* market, causing a misallocation of resources to or from other areas in which free-market forces operate with less restraint.

The Court should also be concerned that these effects will be difficult to root out, particularly because of how plaintiffs' *prima facie* obligations have been

reimagined. Complex antitrust cases will settle under the pressure of this rule or will not be brought at all, because plaintiffs (and defendants) will bear a huge discovery expense in the face of deep uncertainty about how newly minted arguments about "net" effects and "multi-sided markets" will be applied in their cases. These effects will evade this Court's review, as will a burgeoning set of special rules for "two-sided markets" rendered in cases where the issue is either not dispositive or otherwise unsuited to this Court's review.

The problem is also particularly concerning because two-sided platforms are increasingly common. Such firms are not new: Newspapers (readers and advertisers), sports leagues (teams and fans), and cable TV (content providers and subscribers) are all two-sided platforms. That said, modern technologies have led to rapid growth in the number, size and importance of such firms: For example, Microsoft, Apple, Google, Facebook, Uber, and Amazon are all two-sided platforms. And because two-sided platforms are characterized by network effects (the platform becomes more valuable on *all* sides as more users adopt it), there is an entry barrier that tends to increase the possibility of market dominance and anticompetitive behavior in these markets. A special rule that largely exempts such firms from effective antitrust scrutiny is thus particularly dangerous, and even if it is eventually discarded, it may well entrench firms' dominance and create long-term harm to markets in the interim.

Looking forward, the doctrinal novelties in the decision below will form the basis of a new defense in every case directed at the anticompetitive conduct of a

firm that (even arguably) operates a two-sided platform. Answering that defense will not even involve asking the right questions, let alone reaching the right answers. The effects will be acutely felt in the health of both affected markets and the doctrine itself, and so *amici* strongly urge the Court to take up the Question Presented here without delay.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

ERIC F. CITRON
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

July 6, 2017

ADDENDUM

ADDENDUM
Identity of *Amici Curiae*

The *amici* listed below are distinguished antitrust law professors and scholars. University affiliations are listed only for purposes of identification. Listed professors are acting only in their individual capacities and do not purport to represent the views of their universities.

- **Herbert Hovenkamp**, James G. Dinan Professor at the Law School and the Wharton School of the University of Pennsylvania. He has been the Rockefeller Foundation Fellow, Harvard Law School; Fellow of the American Council of Learned Societies, Harvard Law School; Faculty Scholar, University of Iowa; Presidential Lecturer, University of Iowa; and the recipient of the University of Iowa Collegiate Teaching Award. He is the senior surviving author of *Antitrust Law* (formerly with Phillip Areeda & Donald Turner), currently 22 volumes.

- **Harry First**, Charles L. Denison Professor of Law at New York University School of Law and Co-Director of the law school's Competition, Innovation, and Information Law Program. From 1999-2001 he served as Chief of the Antitrust Bureau of the Office of the Attorney General of the State of New York. Professor First is the co-author of the casebook *Free Enterprise and Economic Organization: Antitrust* (7th Ed. 2014). He was twice a

Fulbright Research Fellow in Japan and taught antitrust as an adjunct professor at the University of Tokyo. Professor First is a contributing editor of the *Antitrust Law* Journal, foreign antitrust editor of the *Antitrust Bulletin*, a member of the executive committee of the Antitrust Section of the New York State Bar Association, and a member of the advisory board and a Senior Fellow of the American Antitrust Institute.

- **Einer R. Elhauge**, Petrie Professor of Law at Harvard Law School, where he writes and teaches on Antitrust Law and Economics. Professor Elhauge is author of *U.S. Antitrust Law & Economics*, co-author of *Global Antitrust Law & Economic*, co-author of *Antitrust Law, Vol X* with Areeda, Elhauge & Hovenkamp, editor of the *Research Handbook on the Economics of Antitrust Law*, and the author of articles on antitrust law and economics that have won awards and appeared in peer-reviewed economics journals and top law reviews. He is also President of Legal Economics, LLC, former FTC Special Employee on Antitrust Issus, member of the editorial board for the Competition Policy International, and member of the advisory boards for the Journal of Competition Law & Economics and for the Social Sciences Research Network on Antitrust Law & Policy.

- **Eleanor M. Fox**, Walter J. Derenberg Professor of Trade Regulation at New York University School of Law. She was awarded an inaugural Lifetime Achievement Award in 2011 by the *Global Competition Review* for "substantial, lasting, and transformational impact on competition policy and practice." She received the inaugural award for outstanding contributions to the competition law community in 2015 by the Academic Society for Competition Law, the world network of academic law and economic competition experts.

- **Stephen Calkins**, Professor of Law, Wayne State University. Professor Calkins is the author of one of the seminal Antitrust text books – *Antitrust Law: Policy and Practice* (4th ed. 2008) (with C. Paul Rogers III, Mark R. Patterson and William R. Andersen). He is also the author of *Antitrust Law and Economics in a Nutshell* (5th ed. 2004) (with Ernest Gellhorn and William Kovacic) and served as a co-editor of the *ABA Antitrust Section, Consumer Protection Law Developments* (2009). Professor Calkins is a life member of the American Law Institute, a fellow of the American Bar Foundation and a member of the advisory boards for the American Antitrust Institute, Sedona Conference and National State Attorneys General Program Advisory Project at Columbia Law School. For the American Bar Association, he has served on the Councils

of the Sections of Administrative Law and Regulatory Practice and the Section of Antitrust Law (two, three- year terms). He is a former chair of the Association of American Law School's Antitrust and Economic Regulation Committee.

- **Andrew I. Gavil**, Professor of Law, Howard University. Professor Gavil has co-authored several books, including *Microsoft and the Globalization of Antitrust Law: Competition Policy for the Twenty-First Century* with Professor First(2014), and *Antitrust Law in Perspective: Cases Concepts and Problems in Competition Policy* (3d ed. 2017) with Professors William E. Kovacic, Jonathan B. Baker, and Joshua D. Wright. Professor Gavil served as the Director of the Office of Policy Planning at the U.S. Federal Trade Commission. He currently serves as the Chair of the Editorial Board of the American Bar Association's Section of Antitrust Law's *Antitrust Law Journal* and he also serves as Chair of the Section's International Scholar in Residence Selection Committee.

- **Barak Richman**, Edgar P. and Elizabeth C. Bartlett Professor of Law and Professor of Business Administration at Duke University. He previously served as a law clerk to Judge Bruce M. Selya of the United States Court of Appeals for the First Circuit, and from 1994-1996 he handled international trade legislation

as a staff member of the United States Senate Committee on Finance. He writes regularly on issues related to economics and antitrust. Professor Richman is the author of *Stateless Commerce*, which was published by Harvard University Press.

- **Andrew Chin**, Professor of Law, University of North Carolina School of Law. Professor Chin is the recipient of a Rhodes Scholarship and a National Foundation Graduate Fellowship. He clerked for Judge Henry H. Kennedy Jr. of the United States District Court for the District of Columbia and assisted Judge Thomas Penfield Jackson and his law clerks in the drafting of the findings of fact in *United States v. Microsoft Corporation*.

- **Peter Carstensen**, Fred W. & Vi Miller Chair in Law Emeritus, University of Wisconsin Law School. He previously served as an attorney in the Antitrust Division of the United States Department of Justice. Professor Carstensen is also a Senior Fellow of the American Antitrust Institute.

- **Spencer Weber Waller**, Interim Associate Dean for Academic Affairs, Professor and Director for Consumer Antitrust Studies at Loyola University of Chicago, School of Law.

- **Darren Bush**, Professor of Law and Law Foundation Professor, University of Houston

Law Center. Professor Bush served as a co-author with Harry First and the late John J. Flynn on the antitrust casebook FREE ENTERPRISE AND ECONOMIC ORGANIZATION: ANTITRUST (7th Ed.) with Foundation Press.

- **Robert H. Lande**, Venable Professor of Law, University of Baltimore School of Law. Professor Lande is a co-founder and a Director of the American Antitrust Institute, a past chair of the AALS Antitrust Section, and has held many positions in the ABA Antitrust Section. He is also an elected member of the American Law Institute.

- **Robin Feldman**, Harry & Lillian Hastings Professor of Law & Director of the Institute for Innovation Law, U.C. Hastings College of Law. Professor Feldman previously chaired the Executive Committee of the Antitrust Section of the American Association of Law Schools and clerked for The Honorable Joseph Sneed of the U.S. Court of Appeals for the Ninth Circuit. She is also a Fellow of the American Antitrust Institute.

- **Gregory T. Gundlach**, Coggin Distinguished Professor of Marketing in the Coggin College of Business at the University of North Florida. He is also a Director and Senior Fellow at the American Antitrust Institute. Before coming to the University of North Florida in 2003,

Professor Gundlach was the John Berry, Sr. Professor of Business at the University of Notre Dame.

- **John B. Kirkwood**, Professor of Law, Seattle University School of Law. He is a Senior Fellow of the American Antitrust Institute and an Adviser to the Institute of Consumer Antitrust Studies. Professor Kirkwood previously directed the Planning Office, the Evaluation Office, and the Premerger Notification Program at the FTC's Bureau of Competition in Washington, D.C. and later managed cases and investigations at the Northwest Regional Office.

- **Joshua P. Davis**, Associate Dean for Academic Affairs, Director of the Center for Law and Ethics, Professor, and Dean's Circle Scholar, University of San Francisco, School of Law. Dean Davis is on the board for the American Antitrust Institute, and he previously served as a Fellow at the Center for Applied Legal Studies at Georgetown University Law Center and as the clerk to the Hon. Patrick E. Higginbotham on the Fifth Circuit Court of Appeals.

- **Norman W. Hawker**, Professor of Finance and Commercial Law, Western Michigan University. He is also a Senior Fellow of the American Antitrust Institute.

- **Chris Sagers,** James A. Thomas Distinguished Professor of Law. He is a member of the American Law Institute, a Senior Fellow of the American Antitrust Institute, and a leadership member of the ABA Antitrust Section.

- **Thomas J. Horton**, Professor of Law and Heidepriem Trial Advocacy Fellow at the University of South Dakota School of Law.

- **Warren Grimes**, Associate Dean for Research and Irving D. and Florence Rosenberg Professor of Law, Southwestern Law School. Dean Grimes is co-author of the definitive antitrust law text for lawyers and law students, *The Law of Antitrust: An Integrated Handbook* with the late Professor Lawrence Sullivan. Dean Grimes has chaired the Los Angeles County Bar Association Antitrust and Trade Regulation Section and is a member of the Executive Committee, and he serves on the Advisory Board of the American Antitrust Institute.

- **Mark R. Patterson**, Professor of Law, Fordham University School of Law. Professor Patterson has also been a visiting professor at several law schools in the U.S. and at Bocconi University in Milan. He was a co-author of *Antitrust Law: Policy and Practice* (4th ed. 2008) (with C. Paul Rogers III, Stephen Calkins, and William R. Andersen) and is the

author of the forthcoming book *Antitrust Law in the New Economy: Google, Yelp, LIBOR, and the Control of Information* (Harvard 2017).

- **Marina Lao**, Professor of Law, Seton Hall Law. Professor Lao was previously awarded a Fulbright Fellowship. She currently serves as a member of the advisory board of the American Antitrust Institute, and was Chair of the Section of Antitrust and Economic Regulation of the Association of American Law Schools.

- **Michael A. Carrier**, Professor of Law, Rutgers Law School. Professor Carrier is a co-author of the leading IP/antitrust treatise, *IP and Antitrust Law: An Analysis of Antitrust Principles Applied to Intellectual Property Law* (2d ed. 2009, and annual supplements, with Hovenkamp, Janis, Lemley, and Leslie). He is a member of the Board of Advisors of the American Antitrust Institute and is a past chair of the Executive Committee of the Antitrust and Economic Regulation section of the Association of American Law Schools.

- **Edward Cavanagh**, Professor of Law, St. John's University. Professor Cavanagh is currently a member of the Council of the ABA Antitrust Section. He has previously served as co-chair of the ABA Antitrust Section Public Service Committee. He has also served as co-chair of the Antitrust Section's Civil Practice

and Procedure Committee. Professor Cavanagh is a past chair of the New York State Bar Association Antitrust Section and currently a member of its Executive Committee. Professor Cavanagh is a member of the Association of the Bar of the City of New York and has served on its Antitrust and Trade Regulation Committee and its Federal Courts Committee.

- **Barak Orbach**, Professor of Law and Director of the Business Law program, University of Arizona, James E. Rogers College of Law. Professor Orbach is the author of a leading casebook: *Regulation: Why and How the State Regulates* (Foundation Press, 2012). Professor Orbach previously served as an Advisor for Law & Economics to the Israeli Antitrust Commissioner.

RECORD AND BRIEF

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IN THE

Supreme Court of the United States

STATES OF OHIO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MONTANA, RHODE ISLAND, UTAH, AND VERMONT,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, AND AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR UNITED STATES PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

MICHAEL LANDIS
U.S. PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND, INC.
1543 Wazee Street, Suite 400
Denver, Colorado 80202
(303) 573-5995
mlandis@pirg.org

SHARON K. ROBERTSON
Counsel of Record
COHEN MILSTEIN SELLERS & TOLL PLLC
88 Pine Street, 14th Floor
New York, New York 10005
(212) 838-7797
srobertson@cohenmilstein.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

Amicus curiae is a leading consumer advocacy group with broad knowledge about the history of credit cards and is particularly well qualified to assist the Court in understanding how the public interest, and consumer interests in particular, are undermined by merchant restraints like the one at issue here.[1]

United States Public Interest Research Group Education Fund, Inc. ("U.S. PIRG Education Fund") is a 501(c)(3) independent, non-partisan organization that works on behalf of consumers and the public interest. Through research, public education, and outreach, it serves as a counterweight to the influence of powerful special interests that threaten the public's health, safety, or well-being. U.S. PIRG Education Fund participates as *amicus curiae* in cases that will have a substantial impact on consumers and the public interest, such as this one. U.S. PIRG Education Fund has long advocated on the issue of swipe fee reform. U.S. PIRG believes that cash customers should not pay more to subsidize credit card reward programs and supports efforts to make the costs of credit transparent to consumers.

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1 Counsel for *amicus* provided counsel for the parties timely notice of intent to file this brief, and the parties have filed blanket consents. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since the 1960s, American consumers have increasingly relied on credit cards to purchase goods and services, to the point that around three-quarters of American households now own at least one credit card. Despite this explosion in usage, exceedingly few consumers are aware that different credit cards cost merchants different amounts to process — fees range between 1-4% per transaction — and that these hidden fees result in higher retail prices to *all* consumers as well as massive subsidies from lower-cost credit card users to higher-cost credit card users. This ignorance is by design. Most notably, American Express uses non-discrimination provisions to *contractually bar* merchants from charging consumers different prices for lower-cost credit cards at the point of sale, thus vitiating competition in the market for credit card network services. Buttressed by the lack of interbrand competition, credit card companies charge merchants supra-competitive fees, with American Express cards carrying the highest fees. Merchants then pass along these fees to their customers as *universally* higher prices, thereby shielding high-cost credit card users from internalizing the true cost of their payment method. All of this results in more credit card use (and heftier American Express profits) than an efficient market would afford.

In acknowledgement of the obvious anti-competitive and anti-consumer consequences of such contracts, federal and state authorities sued Visa, Mastercard, and American Express, in 2010. Visa and Mastercard settled. Following a seven-week bench trial, the District Court issued a thorough 150-page opinion, which found American

Express liable under the Sherman Act and accordingly ordered injunctive relief. The Second Circuit reversed, relying on an ostensibly "pro-consumer" understanding of the benefits wrought by American Express's competition-choking contracts.

This Court should grant the States' petition for certiorari and reverse the lower court for the following two reasons:

First, this case concerns anti-competitive behavior in one of the most important markets for everyday American consumers. If American Express's merchant restraints are found acceptable under the Sherman Act, which they are not, consumers will collectively pay *billions of dollars* in inflated retail prices and unfair cross subsidies, and will be shielded from essential information about a product that they use on a daily (if not hourly) basis.

Second, the Second Circuit decision runs roughshod over the fundamental antitrust principles of competition and consumer welfare. In its ruling, the Second Circuit elevated the narrow benefits received *by American Express cardholders* over the widespread costs borne by *all other credit card users* (not to mention poorer, card-less consumers) as a result of American Express's desire to retain its supra-competitive merchant fee profits and welfare-reducing business model. Moreover, the Second Circuit mistakenly viewed the growth in credit card usage as a sign of consumer satisfaction with the industry when, in fact, growth in credit card usage stems in large part from anti-competitive subsidies like the contracts at issue here. This Court should intervene to set lower courts straight on the principles of antitrust law and to foreclose

American Express's merchant restraints, which have no place in a free market system.

ARGUMENT

I. THIS CASE PRESENTS A QUESTION OF PROFOUND ECONOMIC SIGNIFICANCE FOR AMERICAN CONSUMERS

Although this case directly concerns American Express's anti-competitive contracts in the credit card network services market — a market in which merchants are the primary consumers — the economic reality is that ordinary American consumers are harmed by these contracts, too. Put simply, American Express's merchant restraints result in merchants paying supra-competitive prices not just to American Express but to all credit card companies, which in turn results in consumers paying higher retail prices *and* in consumers making decisions about a fundamental economic question (*i.e.*, how should I pay for this good or service?) behind a contractually-induced veil of ignorance. Given the profound economic stakes of the Second Circuit's decision for ordinary Americans, this Court should have the final word.[2]

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2 This is not to say that the relevant market for *antitrust purposes* is both the cardholder and merchant services markets. As explained in the States' Petition, the relevant antitrust market is solely the latter. *See* Pet'rs Br. 18-24. However, the point remains that a reduction in competition in the merchant services market results in harm to consumers *on top of* supra-competitive merchant prices.

A. Merchant Restraints Force Merchants to Recoup Supra-Competitive Credit Card Prices by Raising Sticker Prices for All Consumers, Resulting in Uneconomical Cross-Subsidization

Credit cards (and credit card debt) are growing in America. Over 75 percent of American families own at least one credit card[3] and the average credit-card debt per household is approximately $6,184[4]; in 2016, Americans purchased around $3.3 trillion worth of goods with their credit cards,[5] and total credit card debt reached almost $780 billion.[6]

Unknown to consumers, though, the amount of fees that merchants pay to credit card companies each year for the right to accept credit cards is staggering: almost $70 *billion* in 2016 alone, a number that accounted for 80

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3 *See* Neil J. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M. L. Rev. 327, 333-34 (2014) (discussing growth of consumer debt).

4 The average credit card debt per *indebted* household is even higher: $16,747 per household, a number that is almost the same as it was before the Great Recession. *See* Erin El Issa, *2016 American Household Credit Card Debt Study*, Nerdwallet (Dec. 14, 2016), *available at* https://www.nerdwallet.com/blog/average-credit-card-debt-household/.

5 *See* U.S. Merchants Paid $88.39 Billion in Card Fees in 2016, Nilson Rep. (HSN Consultants, Inc., Carpinteria, Cal.), May 2017, *available at* https://www.nilsonreport.com/upload/pdf/U.S._Merchants_Paid_88.39_Billion_in_Card_Fees_in_2016_The_Nilson_Report.pdf.

6 Nerdwallet, *supra* note 4.

percent of electronic payment fees despite the fact that credit cards only accounted for 56 percent of electronic spending.[7] While economic theory suggests that merchants, especially large merchants, could negotiate to reduce these fees through price discrimination, negotiation, or exit, merchant restraints, like those at issue here, largely prevent merchants from doing so. Instead, merchant swipe fees grow without regard to competitive pressures.[8] American Express offers a case in point. The District Court found that "American Express repeatedly and profitably raised its discount rates to millions of merchants across the United States . . . without losing a single large merchant" and almost no small merchants, despite the fact that American Express's own surveys "indicate that Amex-accepting merchants do not believe they receive commensurate value from the network in return for its higher discount rates." *United States v. American Exp. Co.*, 88 F. Supp. 3d 143, 195, 201 (E.D.N.Y. 2015).

Merchants have passed along these supra-competitive fees to consumers in the form of *universally* heightened retail prices; the wealthy American Express Platinum Card holder and the poor EBT user pay the same inflated price for their groceries, despite the fact that the American Express card charges the merchant up to an additional 3.5

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7 *Id.*

8 *See, e.g.*, Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1345 (2008) (finding that merchant discount rates "increased 23 percent from 2000 to 2006" and that "merchants' absolute cost of accepting payment cards has increased by 139 percent over the same time period").

percentage points to accept.[9] While it is difficult to know exactly what degree of the $70 billion in annual swipe fees goes into higher retail prices, it is undisputed that the fees have raised prices. *See American Exp.*, 88 F. Supp. 3d at 216 (crediting expert testimony and merchant testimony to this effect).[10]

This state of affairs results in high-cost, high-reward credit card users being subsidized by low-cost credit card users and, to a greater extent, debit card and cash-based consumers. One study by the Federal Reserve Bank of Boston found that, "on average, each cash buyer pays $149 to card users and each card buyer receives $1,133 from cash users" in annual cross subsidies.[11] The study also noted the inequality of this subsidization, as only about 40 percent of the lowest-income quintile of Americans owns a credit card, versus 97 percent of households earning over $120,000 per year.[12] Moreover, even if a low-income

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9 See Samuel J. Merchant, Merchant Restraints: Credit-Card-Transaction Surcharging and Interchange-Fee Regulation the Wake of Landmark Industry Changes, 68 OKLA. L. REV. 327, 337-38 (2016) (citing American Express's merchant guidelines).

10 *See also* Alan S. Frankel & Allan A. Shampine, *The Economic Effects of Interchange Fees*, 73 ANTITRUST L.J. 627, 671-72 (2006) (arguing that card acceptance fees "significantly and arbitrarily raise[] prices" and distort competition by "steering consumers toward using more costly and less efficient payment methods").

11 *See* Scott Schuh et al., Federal Reserve Bank of Boston, *Who Gains and Who Loses from Credit Card Payments?* 3 (2010), *available at* https://www.bostonfed.org/economic/ppdp/2010/ppdp1003.pdf.

12 *Id.* at 8; *see also* Levitin, *supra* note 8, at 1356 (further detailing the regressive nature of this cross-subsidy).

person owns a credit card, he or she receives far less of this pro-credit card subsidy, as "by far, the bulk of the transfer gap is enjoyed by high-income credit card buyers."[13] For instance, in absolute terms, the estimated transfer is about $1.4 billion to $1.9 billion from poorer, non-rewards card users to wealthier, rewards card users on gasoline and grocery purchases alone.[14] This analysis is likely doubly true for American Express, whose cards are more expensive for merchants and whose cardholders are 21 percent wealthier than the average American. *See American Exp.*, 88 F. Supp. 3d at 200 n.32 (crediting testimony about American Express's "more affluent cardholders").[15]

Had the Second Circuit upheld the District Court's well-reasoned 10-year bar on American Express's merchant restraints, American consumers would have eventually reaped the rewards of lower merchant fees, namely lower retail prices and diminished cross-subsidization. Indeed, the District Court concluded as much after hearing from a plethora of witnesses at trial. *Id.* at 221 ("the court expects that merchants will pass along some amount of the savings associated with declining swipe fees to their customers in the form of lower retail prices"). Moreover, experience in the U.S. debit card markets demonstrates that lower merchant fees — the

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13 Schuh, *supra* note 11, at 21.

14 See id. at 3 (citing Efraim Berkovich, Card Rewards and Cross-Subsidization in the Gasoline and Grocery Markets, REV. NETWORK ECON. 11.4 (2012)).

15 *See also* NILSON REP., *supra* note 5 (showing that, on average, American Express's merchant fees are higher than Visa, Mastercard, or Discover's merchant fees).

logical result of open competition in the network services market — lead to lower retail prices.[16]

Without this Court's intervention, however, these supra-competitive merchant fees will remain in place, as will the heightened retail prices and unjust cross-subsidization that they engender; these consequences impact virtually every person in the country.

B. Merchant Restraints Result in Ordinary Consumers Making Distorted Decisions About Their Choice of Payment Method

In addition to hitting hundreds of millions of Americans' pocketbooks each day, the conduct at issue in this case causes distortions to commonplace spending decisions. Visit any store in America and you will see merchants using price differences to produce efficiency-enhancing, mutually-beneficial transactions. For instance, when a clothing store receives a special promotion of lower-priced jeans from Levis, they might pass along those savings to customers in the form of a "10% Levis sale" (to the chagrin of Wrangler).

Yet, because of American Express's merchant restraints, the routine act of using mutually-beneficial

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16 *See* Merchant, *supra* note 9, at 376 ("A 2013 study by economist Robert Shapiro found that debit-card-interchange-fee regulation under the Durbin Amendment [to the 2010 Dodd-Frank Act] 'saved consumers and merchants an estimated $8.5 billion in 2012,' with $5.87 billion, or around 70%, passed along to consumers in lower prices.") (citing Robert J. Shapiro, *The Costs and Benefits of Half a Loaf: The Economic Effects of Recent Regulation of Debit Card Interchange Fees*, NAT'L RETAIL FED'N (Oct. 2013), at 2).

price differences is barred with respect to the most fundamental of consumer decisions: choice of payment. If Discover offers a grocer a discounted swipe fee, for example, one would think it reasonable that the grocer offer customers a small discount if they use a Discover card (to the chagrin of American Express). Not so. American Express's merchant restraints block merchants from stating *any* kind of preference about credit card use or offering *any* kind of price difference at the point of sale — even if the merchant never mentions American Express by name. *See American Exp.*, 88 F. Supp. 3d at 165 (gathering examples of the kinds of steering prohibited by merchant restraints, including, *inter alia*, "posting a sign saying 'We Prefer Discover'" or "informing customers that it costs more for the merchant to accept American Express than it does other card brands, even if the statement is true").[17] If consumers were afforded the opportunity to align their credit card use with the merchant's credit card fees, the result would be a freer and more competitive market than the one that exists now. Yet, under the status quo, and by design of American Express, the consumer thinks solely of rewards and benefits when they reach for their high-cost Platinum Card, leaving the true cost of those rewards for the rest of the market to bear while foregoing rewards and benefits at the point of sale that the consumer might find more desirable.

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17 While the Durbin Amendment to the Dodd-Frank Act barred merchant restraints with respect to cash, check, or ACH transfers – all of which are cheaper to process than credit cards – that does not change the fact that different credit cards cost different amounts to process. Shielding customers from those differing costs effectively bans lower-cost credit cards and raises across-the-board retail prices.

There is no good reason, technological or otherwise, that merchants could not offer their customers using credit cards mutually-beneficial alternatives to American Express's rewards. Indeed, the District Court heard testimony from multiple merchants stating that they would offer such price differentials but for American Express's merchant restraints, and from Discover executives saying that they would compete on lower fees but for American Express's merchant restraints. *See id.* at 219 (citing merchant testimony from, *inter alia*, Home Depot); 220 (Discover COO stating that "his network would 'aggressively pursue a strategy of lowering [its] prices' were merchants permitted to steer transactions to Discover").[18] Until merchant restraints are removed, though, consumers will continue to act behind a contractually-induced veil of ignorance, which harms their freedom of choice in addition to their pocketbooks.

American Express's anti-competitive behavior accordingly merits this Court's consideration, as it is raising prices and distorting economic decision making for ordinary Americans on a daily basis. *Cf. Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) (considering the related problem of no-surcharge laws in the consumer purchase market).

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18 Ironically, the District Court noted, American Express uses price differentials in its own travel agency business, where it rewards certain vendors with "increased travel volume in return for offering a lower rate or entering into a 'preferred supplier' relationship with Amex." *Id.* at 218.

II. THE SECOND CIRCUIT'S ELEVATION OF AMERICAN EXPRESS'S INTERESTS OVER CONSUMER WELFARE RUNS AFOUL OF THE PURPOSES OF ANTITRUST LAW AND REQUIRES REVERSAL

In its decision, the Second Circuit chided the District Court for "elevat[ing] the interests of merchants above those of cardholders," but yet pointed primarily to increased rewards for *American Express cardholders* as evidence of "overall consumer satisfaction" with American Express's attempt to preclude competition *across the whole network services market*. *United States v. Am. Exp. Co.*, 838 F.3d 179, 204, 206 (2d Cir. 2016). This argument ignores *factual conclusions* reached by the District Court about actual anti-competitive effects of the merchant restraints, *i.e.*, heightened retail prices and uneconomical subsidization of high-end credit card users. Similarly, the Second Circuit erroneously treated increased credit card usage as evidence of a thriving competitive market. This conclusion disregards the "dysfunction[al]" nature of the credit card industry as well as the harms of excessive credit card growth. *American Exp. Co.*, 88 F. Supp. 3d at 210. In both cases, the Second Circuit placed American Express's desire to maintain its business model, which would not be as profitable in a truly competitive market, over consumer interests. The lower court's decision thus lies in direct contradiction to this Court's emphasis on the Sherman Act as a "consumer welfare prescription," and accordingly merits review. *Nat'l Collegiate Athletics Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 107 (1984).

A. Rewards to American Express Cardholders Do Not Outweigh the Anti-Competitive Effects of American Express's Merchant Restraints on the Rest of Consumers

The thrust of the Second Circuit's decision is that, unless the Government could affirmatively prove that supra-competitive merchant fees outweighed the American Express cardholder rewards that those fees may fund, the Government could not show that the merchant restraints diminished overall consumer welfare. For the reasons stated in Petitioner's brief, this conclusion relies on a mistaken understanding of the relevant market and flips the rule of reason's burden-shifting test on its head. *See* Pet'rs Br. 19-25.[19]

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19 Petitioners are not the only ones to reach that conclusion. The most recent supplement to Philip E. Areeda and Herbert Hovenkamp's seminal treatise on antitrust law described the Second Circuit's burden-shifting as "troubling," noting that "the proper scope of a prima facie case [under the rule of reason] would be for the plaintiff to show that Amex's anti-steering rules had the competitively harmful impact of blunting merchant acceptance competition as between cards with higher and lower merchant acceptance rates" with the burden *then* shifting to Amex to "explain why [their rules] are profitable and in consumers' best interests." 7 Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1505 (4th ed. 2017).

Hovenkamp also wrote that the Second Circuit "*incorrectly conclude[ed]* that the 'relevant market' in which to consider American Express's anti-steering rules was not limited to the market for network services but also included consumers." 2B *id.* ¶ 565 (emphasis added).

What's more, though, the Second Circuit's reasoning relies on a bafflingly narrow understanding of consumer welfare. That is, the Second Circuit treated the merchant restraints under a bifurcated cost-benefit analysis, with the victimized American Express merchants on the one hand and the beneficiary American Express cardholders on the other hand. In reality, though, and as the District Court detailed, the victims of American Express's anti-competitive acts include (i) merchants, *and* (ii) credit card users whose cards cost merchants less than American Express's (*i.e.*, the vast majority of other credit card users), *and* (iii) cash, check, or debit card users. All of these parties are subject to higher retail prices at the store and yet "do not receive any of the premium rewards or other benefits conferred by American Express on the cardholder sides of its platform." *American Exp.*, 88 F. Supp. 3d at 216. The Second Circuit's placement of American Express's interests over these other interests does not comport with an antitrust law premised on open competition and consumer welfare.

The best evidence of the Second Circuit's myopia comes from the widespread anti-competitive effects found as *matters of fact* by the District Court. Besides finding that the merchant restraints allowed American Express to raise prices to merchants beyond what was necessary to fund their rewards program, *see id.* at 215-16 (crediting expert testimony that less than half of American Express's fees flowed directly to its cardholders), the District Court determined that "the [merchant restraints] have also resulted in increased prices for consumers," *id.* at 216. Importantly, the District Court noted that "higher retail prices affect not only those customers who use American Express cards, but also shoppers who instead prefer

to pay using a lower-rewards GPCC card, debit card, check, or cash," and that this externality constituted an "anticompetitive effect" of American Express's merchant restraints. *Id.* at 216-17; *see also id.* (further describing the highly regressive nature of this cross-subsidization, all for the benefit of American Express's "relatively small, affluent cardholder base"). The District Court's factual conclusions cohere with academic research finding that inflated merchant fees, which are partially wrought by merchant restraints, harm consumers more than they help them.[20]

Amazingly, though, the Second Circuit relegated the District Court's finding concerning heightened across-the-board retail prices to a dismissive footnote, *Am. Exp. Co.*, 838 F.3d at 204 n.52, and otherwise ignored the District Court's findings with respect to cross-subsidization and the rest of the consumer market. This utter failure to acknowledge anti-competitive effects on consumers beyond American Express cardholders showcases a narrow view of antitrust law that is in sore need of this Court's steadying hand.[21]

B. Growth in the Credit Card Industry Is Not Necessarily Evidence of a Healthy, Competitive Payment Market

Besides understating the anti-competitive harms to consumers beyond American Express cardholders, the Second Circuit placed a misguided faith in increased

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20 *See, e.g.*, Levitin, *supra* note 8; Frankel & Shampine, *supra* note 10.

21 *See also, supra*, I note 19.

credit card output as evidence of a "thriving market" with "increased competition." *Am. Exp. Co.*, 838 F.3d at 206. Yet, as Professor Adam Levitin has described in great detail, credit cards have grown, in part, *precisely because of the anti-competitive merchant restraints at issue here.* Because merchant restraints "prevent merchants from signaling to consumers the costs of different payment methods . . . [,] consumers never internalize the costs of their choice of payment system."[22] Ergo, "by making credit cards appear relatively cheaper to other payment systems, merchant restraints encourage higher usage of credit cards than would otherwise occur."[23] In other words, anti-competitive behavior distorts the market in favor of credit cards, particularly high-cost American Express reward cards.

Under the circumstances, then, increased credit card output should not inherently be understood as natural, consumer-driven market growth. This distinction matters in antitrust law, as growth in one market (*i.e.*, credit cardholders) cannot be justified by American Express's unilateral decision to preclude competition and distort prices in another market (*i.e.*, merchants purchasing the right to process credit cards). *See Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (rejecting a practice that "prevent[ed] customers from making price comparisons" for public safety reasons, as it inappropriately "impos[ed] [one group's] views of the costs and benefits of competition on the entire marketplace").[24]

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22 Levitin, *supra* note 8, at 1404-05.

23 *Id.* at 1356.

24 *See also* 2B Areeda & Hovenkamp, *supra* note 19, ¶ 562e

As a final note, it bears emphasizing the social harms caused by excessive credit card growth, which the merchant restraints at issue here help fuel and which the Second Circuit would have done well to acknowledge. It is clear to most that, for all the benefits of credit cards, an outsized reliance on the product has led to "decreased consumer purchasing power caused by increased debt service; [ ] decreased consumer purchasing power caused by inflation; and [an] increased rate of consumer bankruptcy filings."[25] Indeed, credit card companies rely on consumers' cognitive biases to market "cheap" cards, only to profit off consumers who fall into deeper debt than they expected.[26] Far from being an academic concern, America's political leaders have expressed consternation about America's credit card use as well.[27] Given this

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(noting that the Second Circuit "failed to see . . . that under antitrust policy *competition* should choose the optimal mix of revenue as between the two sides, an issue obfuscated by the incorrect finding that these two elements of revenue were within the same antitrust market. By preventing merchants from offering product discounts in exchange for using a card with a lower merchant fee, Amex was preventing consumers from making this comparison.") (emphasis in original) (citing *NCAA v. Board of Regents*, 468 U.S. 85 (1984)).

25 Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 HARV. J. ON LEGIS. 1, 43 (2008); *see also* Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1377 (2004) (noting that "the long-term costs [of credit card use] outweigh any short-term benefit, because the long-term costs hit the consumer when she is most vulnerable, when financial distress forces her to borrow").

26 *See generally* Bar-Grill, *supra* note 22.

27 *See, e.g.*, H.R. Rep. No. 111-88, at 10 (2009), *reprinted in* 2009 U.S.C.C.A.N. 453, 454 ("The accumulation of large amounts

situation, and the fact that credit card debt is nearing levels not seen since the eve of the Great Recession,[28] it seems that anti-competitive behavior resulting in overuse of such a risky product is of particular moment to our antitrust laws.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: July 6, 2017

Respectfully submitted,

MICHAEL LANDIS
U.S. PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND, INC.
1543 Wazee Street, Suite 400
Denver, Colorado 80202
(303) 573-5995
mlandis@pirg.org

SHARON K. ROBERTSON
Counsel of Record
COHEN MILSTEIN SELLERS & TOLL PLLC
88 Pine Street, 14th Floor
New York, New York 10005
(212) 838-7797

Counsel for Amicus Curiae

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of credit card debt can have profound implications on individual consumers and the economy more generally.") (CARD Act legislative history).

28 *See supra* note 4 and accompanying text.

No. 16-1454

In the Supreme Court of the United States

STATES OF OHIO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MONTANA, RHODE ISLAND, UTAH, AND VERMONT,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, AND AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

MICHAEL DEWINE
Attorney General of Ohio
ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor
HANNAH C. WILSON
Deputy Solicitor
30 East Broad St., 17th Floor
Columbus, OH 43215
614-466-8980
eric.murphy@
ohioattorneygeneral.gov

Counsel for Petitioner State of Ohio

EVAN R. CHESLER*
**Counsel of Record*
PETER T. BARBUR
KEVIN J. ORSINI
RORY A. LERARIS
Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
212-474-1000
echesler@cravath.com

Counsel for Respondents American Express Co. and American Express Travel Related Services Co., Inc.

[Additional counsel listed on inside front cover]

PETITION FOR WRIT OF CERTIORARI FILED JUNE 2, 2017
CERTIORARI GRANTED OCTOBER 16, 2017

NOEL FRANCISCO
Solicitor General
U.S. Department of Justice
950 Pennsylvania Ave., NW
Room 5616
Washington, D.C. 20530
202-514-2217
SupremeCtBriefs@USDOJ.gov

Counsel for Respondent United States

JOSEPH SCHLOTZHAUER
Assistant Attorney General
Office of the Attorney General
815 Olive Street, Suite 200
St. Louis, MO 63101
314-340-7945
joseph.schlotzhauer@ago.mo.gov

Counsel for Respondent Missouri

DAVID ANTHONY RIENZO
Law Office Infrastructure
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301
603-271-1268
david.rienzo@doj.nh.gov

Counsel for Respondent New Hampshire

DAVID M. ASHTON
BRET FULKERSON
Texas Attorney General's Office
Antitrust Section - 7th Floor
300 W. 15th Street
Austin, TX 78701
512-936-1781
david.ashton@texasattorneygeneral.gov

Counsel for Respondent Texas

NANCY BONNELL
Antitrust Unit Chief
Civil Litigation Division
Office of the Attorney General
1275 West Washington Street
Phoenix, AZ 85007
602-542-7728
Nancy.Bonnell@azag.gov

Counsel for Respondent Arizona

COLLIN KESSNER
Assistant Attorney General
Office of the Attorney General
2115 State Capitol Building
Lincoln, NE 68509
402-471-1928
collin.kessner@nebraska.gov

Counsel for Respondent Nebraska

JOSEPH F. WHALEN
Associate Solicitor General
Office of the Attorney General
500 Charlotte Avenue
Nashville, TN 37243
615-741-3499
joe.whalen@ag.tn.gov

Counsel for Respondent Tennessee

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RELEVANT DOCKET ENTRIES

United States of America, et al. v.
American Express Company, et al.,
U.S. District Court
Eastern District of New York (Brooklyn)
Case No. 1:10-cv-04496

10/04/2010	1	COMPLAINT against America Express Company, American Express Travel Related Services Company, Inc., Mastercard International Incorporated, Visa Inc. Disclosure Statement on Civil Cover Sheet completed -No,, filed by State of Maryland, State of Connecticut, State of Iowa, State of Texas, State of Michigan, United States of America, State of Ohio, State of Missouri. (Attachments: # 1 Civil Cover Sheet) (Davis, Kimberly) (Entered: 10/04/2010)
10/04/2010		Summons Issued as to America Express Company, American Express Travel Related Services Company, Inc., Mastercard International Incorporated, Visa Inc. (Davis, Kimberly) (Entered: 10/04/2010)
10/04/2010	3	NOTICE by United States of America of the Applicability of the APPA to the Proposed Final Judgment (Malawer, Gregg) (Entered: 10/04/2010)

10/04/2010	4	NOTICE of Settlement Stipulation Concerning Entry of PROPOSED Final Judgment as to Defendants Visa and MasterCard, After Compliance with the APPA by United States of America (Attachments: # 1 Exhibit A -- PROPOSED Final Judgment as to Defendants Visa and MasterCard) (Malawer, Gregg) (Entered: 10/04/2010)
10/04/2010	5	NOTICE by United States of America Competitive Impact Statement (Concerning PROPOSED Final Judgment as to Defendants Visa and MasterCard) (Malawer, Gregg) (Entered: 10/04/2010)
10/14/2010	16	NOTICE by Mastercard International Incorporated / Description of Written or Oral Communications Concerning Proposed Final Judgment and Certification of Compliance with 15 U.S.C. § 16(g) by Mastercard International Incorporated (Attachments: # 1 Certificate of Service) (Finch, Andrew) (Entered: 10/14/2010)
10/18/2010	22	NOTICE by Mastercard International Incorporated / Supplemental Description of Written or Oral Communications Concerning Proposed Final

		Judgment and Certification of Compliance with 15 U.S.C. § 16(g) (Attachments: # 1 Certificate of Service) (Finch, Andrew) (Entered: 10/18/2010)
12/07/2010	46	ANSWER to 1 Complaint, by American Express Company, American Express Travel Related Services Company, Inc. (Brenner, Eric) (Entered: 12/07/2010)
12/07/2010	47	Letter dated 12/6/2010 from Eugene A. Spector to the Clerk of Court attaching a Copy of motion of Plaintiff for transfer of Actions pursuant to 28 USC 1407 and supporting documents. (Attachments: # 1 Copy of Motion for Transfer of Actions filed before the MDL panel, # 2 Copy of Brief in support, # 3 Schedule of Actions, # 4 Proof of Service, # 5 Exhibit Part 1, # 6 Exhibit Part 2, # 7 Exhibit Part 3, # 8 Exhibit Part 4, # 9 Exhibit Part 5, # 10 Exhibit Part 6, # 11 Exhibit Part 7, # 12 Exhibit Part 8, # 13 Exhibit Part 9, # 14 Exhibit Part 10, # 15 Exhibit Part 11, # 16 Exhibit Part 12, # 17 Exhibit Part 13, # 18 Exhibit Part 14, # 19 Exhibit Part 15, # 20 Exhibit Part 16) (Marziliano, August) (Entered: 12/08/2010)
12/10/2010		Minute Entry for proceedings held

before Judge Nicholas G. Garaufis: Status Conference held on 12/9/2010. No parties object to consolidation before this court by the Judicial Panel on Multidistrict Litigation of the cases discussed at conference, and will so inform the MDL panel. All parties agree that they will provide the court with a joint discovery schedule within sixty days. The United States has also stated that it will soon file an Amended Complaint in its action. (Court Reporter Holly Driscoll.) Associated Cases: 1:08-cv-02315-NGG-RER, 1:08-cv-02316-NGG-RER, 1:08-cv-02317-NGG-RER, 1:08-cv-02380-NGG-RER, 1:08-cv-02406-NGG-RER, 1:10-cv-04496-NGG-RER, 2:10-cv-05200-DRH-ARL, 2:10-cv-05369-NGG-RER. (Sherkow, Jacob) (Entered: 12/10/2010)

12/14/2010 51 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on December 9, 2010, before Judge Garaufis. Court Reporter/Transcriber H. Driscoll, Telephone number (718)613-2274. Email address: hdrisc@aol.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for

		Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/4/2011. Redacted Transcript Deadline set for 1/14/2011. Release of Transcript Restriction set for 3/14/2011. (Driscoll, Holly) (Entered: 12/14/2010)
12/20/2010	55	STIPULATION Regarding Additional Parties to Proposed Final Judgment by United States of America (Matelson, Bennett) (Entered: 12/20/2010)
12/20/2010	56	CERTIFICATE OF SERVICE by United States of America (Matelson, Bennett) (Entered: 12/20/2010)
12/21/2010	57	AMENDED COMPLAINT against American Express Company, American Express Travel Related Services Company, Inc., Mastercard International Incorporated, Visa Inc., filed by State of Maryland, State of Connecticut, United States of America, State of Ohio, State of Missouri, State of Iowa, State of Michigan, State of Texas, State of Illinois, State of Tennessee, State of Montana, State of Nebraska, State of Idaho, State of Vermont, State of Utah, State of Arizona, State of Rhode Island, State of Hawaii, State of New Hampshire. (Matelson, Bennett) (Entered:

		12/21/2010)
12/21/2010	58	CERTIFICATE OF SERVICE by United States of America (Matelson, Bennett) (Entered: 12/21/2010)
01/04/2011	61	Amended ANSWER to 57 Amended Complaint,, by American Express Company, American Express Travel Related Services Company, Inc. (Korologos, Philip) (Entered: 01/04/2011)
03/02/2011	92	DISCOVERY COORDINATION ORDER. So Ordered by Magistrate Judge Ramon E. Reyes, Jr on 3/2/2011. (Vertus, Miriam) (Main Document 92 replaced on 3/11/2011) (Vertus, Miriam). (Entered: 03/03/2011)
03/02/2011	93	SCHEDULING ORDER: The following discovery order shall be in place, and supercedes previous scheduling orders in the cases. See attached order for details. So Ordered by Magistrate Judge Ramon E. Reyes, Jr on 3/2/2011. (Vertus, Miriam) (Main Document 93 replaced on 3/11/2011) (Vertus, Miriam). (Entered: 03/03/2011)
04/07/2011	103	STIPULATION of Dismissal Without Prejudice of the Claim Asserted by State of Hawaii (Kimura, Rodney) (Entered: 04/07/2011)

04/12/2011	104	Stipulation for Dismissal without Prejudice of the Claim of the State of Hawaii. So Ordered by Judge Nicholas G. Garaufis on 4/8/2011. (Lee, Tiffeny) (Entered: 04/12/2011)
06/14/2011	119	Letter regarding filing of United States' Response to Public Comments on proposed Final Judgment by United States of America (Attachments: # 1 United States' Response to Public Comments, # 2 Comment from Merchant Class Plaintiffs, # 3 Comment from Individual Merchant Plaintiffs, # 4 Comment from Consumer World, # 5 Comment from Retail Industry Leaders Association, # 6 Comment from Sears Holdings Corporation, # 7 Comment from MDL 1720 Merchant Class Plaintiffs, # 8 Exhibit 1 to Comment from MDL 1720 Merchant Class Plaintiffs, # 9 Exhibit 2 to Comment from MDL 1720 Merchant Class Plaintiffs, # 10 Exhibit 3 to Comment from MDL 1720 Merchant Class Plaintiffs, # 11 Exhibit 4 to Comment from MDL 1720 Merchant Class Plaintiffs, # 12 Exhibit 5 to Comment from MDL 1720 Merchant Class Plaintiffs, # 13 Exhibit 6 to Comment from MDL 1720 Merchant Class Plaintiffs, # 14 Declaration of Judson Reed

(Visa), # 15 Letter from Visa Counsel to United States, # 16 Declaration of Brad Tomchek (MasterCard), # 17 Letter from MasterCard Counsel to United States) (Matelson, Bennett) (Entered: 06/14/2011)

06/14/2011 120 MOTION for Application to Excuse Federal Register Publication pursuant to 15 U.S.C. 16(d) by United States of America. (Attachments: # 1 Proposed Order, # 2 Order from United States v. Keyspan, # 3 Order from United States v. Ticketmaster) (Matelson, Bennett) Modified docket text on 6/22/2011 (Lee, Tiffeny). (Entered: 06/14/2011)

06/22/2011 121 ORDER re 120 : Accordingly, the United States is excused from publishing the substance of the public comments in the Federal Register, see 15 U.S.C. § 16(d)(2), except for a notice stating that it received six public comments in this case, and that the comments and the United States' responses are available on the DOJ's website. In mentioning that this material is available on theDOJ's website, the United States should also include an appropriate, permanent website address pointing to those comments online. The United States shall also

		certify to the court that it has published such notice by proof of publication filed on the court's docket. So Ordered by Judge Nicholas G. Garaufis on 6/20/2011. (Lee, Tiffeny) (Entered: 06/22/2011)
07/14/2011	132	STIPULATION and [Proposed] Order For The Preservation And Production of Documents And Electronically Stored Information by United States of America (Attachments: # 1 Proposed Order Stipulation and [Proposed] Order For The Preservation And Production Of Documents And Electronically Stored Information) (Hamer, Mark) (Entered: 07/14/2011)
07/14/2011	133	NOTICE by United States of America of Publication in Federal Register (Attachments: # 1 Exhibit Federal Register Notice) (Matelson, Bennett) (Entered: 07/14/2011)
07/14/2011	134	MOTION for pre motion conference re Entry of Final Judgment as to Defendants Visa and MasterCard by United States of America. (Attachments: # 1 Final Judgment, # 2 Certificate of Compliance) (Matelson, Bennett) (Entered: 07/14/2011)
07/14/2011	136	STIPULATION and Order For The Preservation And Production of

		Documents And Electronically Stored Information. Ordered by Magistrate Judge Ramon E. Reyes, Jr on 7/14/2011. (Lee, Tiffeny) (Entered: 07/18/2011)
07/20/2011	142	MEMORANDUM AND ORDER: The court FINDS that the Proposed Final Judgment is in public interest pursuant to 15 U.S.C. § 16(e). The court will approve the Proposed Final Judgment separately. The court also FINDS, under Federal Rule of Civil Procedure 54(b), that there is no just reason for delay in entry of the final judgment against Defendants MasterCard International Incorporated and Visa Inc., and directs the Clerk of Court to enter final judgment against these Defendants after the court has approved the Proposed Final Judgment. So Ordered by Judge Nicholas G. Garaufis on 7/20/2011. (Lee, Tiffeny) (Entered: 07/20/2011)
07/20/2011	143	FINAL JUDGMENT as to Defendants Mastercard International Incorporated and Visa Inc. Ordered by Judge Nicholas G. Garaufis on 7/20/2011. (Lee, Tiffeny) (Entered: 07/20/2011)
09/02/2011	159	Proposed Scheduling Order AMENDED by Individual Plaintiffs in 11-md-2221 (Germaine, David)

(Entered: 09/02/2011)

09/06/2011 160 ORDER re 159 Proposed Scheduling Order filed by Individual Plaintiffs in 11-md-2221. Proposed amended scheduling order is "So Ordered." (See attached order for further information.) Conference dates previously set. See Minute Entry dated 8/30/2011. Ordered by Magistrate Judge Ramon E. Reyes, Jr. on 9/6/2011. (Rivera, Marta) (Entered: 09/06/2011)

03/09/2012 207 Letter to Magistrate Judge Reyes re Application to Lift Partial Stay by Class Plaintiffs in 11-md-2221 (Kitzman, Tracey) (Entered: 03/09/2012)

03/16/2012 ORDER re 207 Letter filed by Class Plaintiffs in 11-md-2221. American Express is directed to respond to the Class Plaintiffs' motion by 3/21/2012 via ECF and by sending one courtesy hard copy to chambers. Ordered by Magistrate Judge Ramon E. Reyes, Jr. on 3/16/2012. (Martone, Heather) (Entered: 03/16/2012)

03/19/2012 209 Letter to Hon. Ramon E. Reyes re Supplemental Authority by Class Plaintiffs in 11-md-2221 (Attachments: # 1 Exhibit A, # 2 Exhibit B) (Friedman, Gary) (Entered: 03/19/2012)

03/21/2012	212	Letter from Evan R. Chesler to Magistrate Judge Reyes in opposition to Class Plaintiffs' application to lift the partial stay of class proceedings by American Express Company, American Express Travel Related Services Company, Inc. (Attachments: # 1 Exhibit A to Chesler 3.21.12 Letter, # 2 Exhibit B to Chesler 3.21.12 Letter, # 3 Exhibit C to Chesler 3.21.12 Letter, # 4 Exhibit D to Chesler 3.21.12 Letter, # 5 Exhibit E to Chesler 3.21.12 Letter, # 6 Exhibit F to Chesler 3.21.12 Letter, # 7 Exhibit G to Chesler 3.21.12 Letter, # 8 Exhibit H to Chesler 3.21.12 Letter, # 9 Exhibit I to Chesler 3.21.12 Letter, # 10 Exhibit J to Chesler 3.21.12 Letter, # 11 Exhibit K (Part 1) to Chesler 3.21.12 Letter, # 12 Exhibit K (Part 2) to Chesler 3.21.12 Letter, # 13 Exhibit L to Chesler 3.21.12 Letter) (Chesler, Evan) (Entered: 03/21/2012)
03/27/2012	213	Minute Entry for proceedings held before Magistrate Judge Ramon E. Reyes, Jr:Status/Motion Conference held on 3/27/2012. Discussions held. re 145 Letter application to Lift Partial Stay is denied, reason on record. [146-2]Scheduling order entered. Attendance sheet is

		attached. (Tape #4:39:49 - 5:57:06.) Associated Cases: 1:11-md-02221-NGG-RER et al. (Vertus, Miriam) (Entered: 03/28/2012)
03/28/2012	214	AMENDED SCHEDULING ORDER: See attached order for deadlines. So Ordered by Magistrate Judge Ramon E. Reyes, Jr on 3/27/2012. Associated Cases: 1:11-md-02221-NGG-RER et al. (Vertus, Miriam) (Entered: 03/28/2012)
06/14/2012		ORDER re 220 Letter filed by American Express Company, American Express Travel Related Services Company, Inc. The parties' Deposition Coordination Order is "so ordered." Ordered by Magistrate Judge Ramon E. Reyes, Jr. on 6/14/2012. (Martone, Heather) (Entered: 06/14/2012)
12/18/2012	259	AMENDED SCHEDULING ORDER: The following discovery order shall be in place, and supersedes previous scheduling order in the cases. See attached order for further details. Ordered by Magistrate Judge Ramon E. Reyes, Jr on 12/14/2012. (Vertus, Miriam) (Entered: 12/18/2012)
01/16/2013		ORDER re 261 Status Report filed by American Express Company. Per the Status Report the following is

		entered as an amendment to the current scheduling order: 1. The parties shall exchange proposed expert discovery orders simultaneously on February 15, 2013. These proposals will not be filed with the Court. 2. The parties shall meet and confer, and then shall file a joint expert discovery order, or competing proposed orders with supporting letter briefs (no more than three pages per side), along with a status report on March 1, 2013. Status Conference set for 3/8/2013 at 11:00 AM in Courtroom 2E North before Magistrate Judge Ramon E. Reyes, Jr. Ordered by Magistrate Judge Ramon E. Reyes, Jr. on 1/16/2013. (Morales, Luis) (Entered: 01/16/2013)
03/08/2013	265	EXPERT DISCOVERY ORDER re 230 filed in case 1:11-md-02221-NGG-RER "so ordered" by Magistrate Judge Ramon E. Reyes, Jr. on 3/08/2013. Associated Cases: 1:11-md-02221-NGG-RER et al. (Morales, Luis) (Entered: 03/08/2013)
06/28/2013		ORDER: The proposed briefing schedule for American Express' motion to dismiss the claims of class Plaintiffs in favor of arbitration, submitted on consent of class Plaintiffs, is hereby APPROVED.

	American Express shall serve its motion by July 10, 2013; class Plaintiffs' opposition must be served by July 24, 2013; American Express shall serve its reply and file the fully-bundled motion with the court by August 5, 2013. The court deputy will contact all of the parties in 11-MD-2221 and 10-CV-4496 to set a status conference to address scheduling matters relating to the various parties' proposed motions for summary judgment and consolidation. Ordered by Judge Nicholas G. Garaufis on 6/28/2013. (White, Sarah) (Entered: 06/28/2013)
07/25/2013	Minute Entry for proceedings held before Judge Nicholas G. Garaufis: Status conference with the parties in 11-MD-2221 and 10-CV-4496, which were consolidated for discovery, held on July 25, 2013. Richard Arnold, Paul Slater, and Eric Bloom appeared for the individual plaintiffs; Tracey Kitzman appeared for the class plaintiffs; Rachel Davis appeared for the state plaintiffs; Craig Conrath and Mark Hamer appeared for the United States; Evan Chesler, Kevin Orsini, and Phil Korologis appeared for American Express. Discovery is expected to close as

scheduled on August 15, 2013, with minor exceptions as agreed upon by all parties. The parties were heard regarding American Express's proposed motions for summary judgment and to consolidate the cases for trial, and on possible Daubert issues. The court set the following briefing schedule: Motions for summary judgment and to consolidate the cases for trial must be served by September 26, 2013; opposition to the motions must be served by November 21, 2013; replies, if any, must be served and the fully-briefed motions filed on ECF by January 9, 2013. Daubert motions relevant to the summary judgment briefing may be served alongside the motions for summary judgment. (Court Reporter Anthony Frisolone.) (White, Sarah) (Entered: 07/25/2013)

09/26/2013 281 Notice of MOTION for Summary Judgment and [Proposed] Order by American Express Company, American Express Travel Related Services Company, Inc. (Chesler, Evan) (Entered: 09/26/2013)

09/26/2013 282 MOTION for Leave to Electronically File Document under Seal by American Express Company, American Express Travel Related Services Company, Inc.

(Attachments: # 1 Memorandum of Law in Support of Defendants' Motion for Summary Judgment, # 2 Defendants' Statement of Material Undisputed Facts in Support of their Motion for Summary Judgment, # 3 Declaration of Kevin J. Orsini in Support of Defendants' Motion for Summary Judgment) (Chesler, Evan) (Entered: 09/26/2013)

09/26/2013 283 EXHIBIT S to the Declaration of Kevin J. Orsini in Support of Defendants' Motion for Summary Judgment by American Express Company, American Express Travel Related Services Company, Inc. Related document: 282 Motion for Leave to Electronically File Document under Seal, Sealed,, filed by American Express Company, American Express Travel Related Services Company, Inc. (Attachments: # 1 Exhibit 8, # 2 Exhibit 10, # 3 Exhibit 37, # 4 Exhibit 38, # 5 Exhibit 39, # 6 Exhibit 41, # 7 Exhibit 44, # 8 Exhibit 48, # 9 Exhibit 49, # 10 Exhibit 50, # 11 Exhibit 52, # 12 Exhibit 61, # 13 Exhibit 64, # 14 Exhibit 65, # 15 Exhibit 66, # 16 Exhibit 67, # 17 Exhibit 68, # 18 Exhibit 69, # 19 Exhibit 70, # 20 Exhibit 71, # 21 Exhibit 72, # 22

Exhibit 73, # 23 Exhibit 74, # 24 Exhibit 75, # 25 Exhibit 92, # 26 Exhibit 98, # 27 Exhibit 143, # 28 Exhibit 144, # 29 Exhibit 153, # 30 Exhibit 157, # 31 Exhibit 162, # 32 Exhibit 164, # 33 Exhibit 178, # 34 Exhibit 180) (Chesler, Evan) (Entered: 09/26/2013)

09/26/2013 284 Letter from Evan R. Chesler to Hon. Nicholas G. Garaufis re Defendants' Motion for Summary Judgment by American Express Company, American Express Travel Related Services Company, Inc. (Chesler, Evan) (Entered: 09/26/2013)

09/26/2013 285 Notice of MOTION to Consolidate Cases for the Purpose of Trial and [Proposed] Order by American Express Company, American Express Travel Related Services Company, Inc. (Chesler, Evan) (Entered: 09/26/2013)

09/26/2013 286 MOTION for Leave to Electronically File Document under Seal by American Express Company, American Express Travel Related Services Company, Inc. (Attachments: # 1 Memorandum of Law in Support of Defendants' Motion to Consolidate for the Purpose of Trial, # 2 Declaration of Justine V. Beyda, # 3 Exhibit 8 to Beyda Declaration, # 4 Exhibit 9 to

Beyda Declaration, # 5 Exhibit 10 to Beyda Declaration, # 6 Exhibit 11 to Beyda Declaration, # 7 Exhibit 12 to Beyda Declaration, # 8 Exhibit 13 to Beyda Declaration, # 9 Exhibit 14 to Beyda Declaration, # 10 Exhibit 15 to Beyda Declaration, # 11 Exhibit 16 to Beyda Declaration, # 12 Exhibit 17 to Beyda Declaration, # 13 Exhibit 18 to Beyda Declaration, # 14 Exhibit 19 to Beyda Declaration, # 15 Exhibit 20 to Beyda Declaration, # 16 Exhibit 21 to Beyda Declaration, # 17 Exhibit 22 to Beyda Declaration, # 18 Exhibit 23 to Beyda Declaration, # 19 Exhibit 24 to Beyda Declaration, # 20 Exhibit 25 to Beyda Declaration, # 21 Exhibit 27 to Beyda Declaration, # 22 Exhibit 28 to Beyda Declaration, # 23 Exhibit 29 to Beyda Declaration, # 24 Exhibit 30 to Beyda Declaration, # 25 Exhibit 31 to Beyda Declaration, # 26 Exhibit 32 to Beyda Declaration, # 27 Exhibit 33 to Beyda Declaration, # 28 Exhibit 34 to Beyda Declaration, # 29 Exhibit 36 to Beyda Declaration, # 30 Exhibit 37 to Beyda Declaration, # 31 Exhibit 38 to Beyda Declaration, # 32 Exhibit 39 to Beyda Declaration, # 33 Exhibit 40 to Beyda Declaration) (Chesler, Evan) (Entered: 09/26/2013)

09/26/2013	287	EXHIBIT 1 to the Declaration of Justine V. Beyda by American Express Company, American Express Travel Related Services Company, Inc. Related document: 286 Motion for Leave to Electronically File Document under Seal, Sealed,,,,,,,,,,,, filed by American Express Company, American Express Travel Related Services Company, Inc. (Attachments: # 1 Exhibit 2 to Beyda Declaration, # 2 Exhibit 3 to Beyda Declaration, # 3 Exhibit 4 to Beyda Declaration, # 4 Exhibit 5 to Beyda Declaration, # 5 Exhibit 6 to Beyda Declaration, # 6 Exhibit 7 to Beyda Declaration, # 7 Exhibit 26 to Beyda Declaration, # 8 Exhibit 35 to Beyda Declaration) (Chesler, Evan) (Entered: 09/26/2013)
09/26/2013	288	MOTION to Seal ("Application for Leave to File Defendants' Exhibits 1-6, 9, 11-36, 40, 42-43, 45-47, 51, 53-60, 62-63, 76-91, 93-97, 99-142, 145-147, 150-152, 154-156, 158-161, 163, 165-177, 179, 181-192 to the Declaration of Kevin J. Orsini in Support of Defendants' Motion for Summary Judgment Under Seal"(original sealed exhibits filed with the Clerk's Office)) by American Express Company, American Express Travel Related

		Services Company, Inc. (Chesler, Evan) (Entered: 09/26/2013)
11/21/2013	293	MEMORANDUM in Opposition to Defendants' Motion to Consolidate for the Purpose of Trial filed by United States of America. (Attachments: # 1 Declaration, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit, # 11 Exhibit, # 12 Exhibit, # 13 Exhibit) (Hamer, Mark) (Entered: 11/21/2013)
12/06/2013	294	MOTION for Leave to Electronically File Document under Seal Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment by United States of America. (Attachments: # 1 Memorandum in Opposition) (Hamer, Mark) (Entered: 12/06/2013)
12/06/2013	295	MOTION for Leave to Electronically File Document under Seal Declaration of Mark Hamer in Opposition to Defendants' Motion for Summary Judgment by United States of America. (Attachments: # 1 Declaration) (Hamer, Mark) (Entered: 12/06/2013)
12/06/2013	296	MOTION for Leave to Electronically File Document under Seal Plaintiffs' Rule 56.1 Counter-

		Statement of Material Facts in Opposition to Defendants' Motion for Summary Judgment by United States of America. (Attachments: # 1 Rule 56.1 Statement) (Hamer, Mark) (Entered: 12/06/2013)
12/19/2013	303	Letter Enclosing Supplemental Authority Supporting Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment (docket no. 294) by United States of America (Attachments: # 1 Exhibit) (Ewalt, Andrew) (Entered: 12/19/2013)
01/09/2014	308	MOTION for Leave to Electronically File Document under Seal by American Express Company, American Express Travel Related Services Company, Inc. (Attachments: # 1 Reply Memorandum of Law in Further Support of Defendants' Motion to Consolidate for the Purpose of Trial, # 2 Declaration of Justine V. Beyda in Further Support of Motion to Consolidate for the Purpose of Trial, # 3 Exhibit 41 to Beyda Declaration, # 4 Exhibit 42 to Beyda Declaration, # 5 Exhibit 43 to Beyda Declaration, # 6 Exhibit 44 to Beyda Declaration, # 7 Exhibit 45 to Beyda Declaration, # 8 Exhibit 46 to Beyda Declaration, # 9 Exhibit 47 to Beyda Declaration, # 10 Exhibit 48 to Beyda

		Declaration) (Chesler, Evan) (Entered: 01/09/2014)
01/10/2014	309	Letter to Judge Garaufis from K. Orsini regarding Defendants' Reply in Further Support of Their Motion to Consolidate for the Purpose of Trial by American Express Company, American Express Travel Related Services Company, Inc. (Orsini, Kevin) (Entered: 01/10/2014)
01/14/2014		Minute Entry for proceedings held before Judge Nicholas G. Garaufis: Scheduling Conference held on 1/14/2014: All parties were present and discussed scheduling of pre-trial matters as well as the Class Plaintiffs' proposed settlement. The court issued the following orders:(1) A final pre-trial conference will be held on June 6, 2014, at 11 am in Courtroom 4D and trial will begin on June 16, 2014. The court has not yet decided the issue of consolidation. (2)Defendants, Government Plaintiffs, and Individual Merchant Plaintiffs are directed to confer regarding the scheduling of pre-trial matters and shall propose an agreed-upon schedule to the court within seven days. Should they be unable to agree on a joint schedule, parties shall signal their disagreement at

		that time. (3)Oral argument on Defendants' motions for summary judgment in the Government Plaintiffs' and Individual Merchant Plaintiffs' cases is scheduled for Wednesday, March 19, 2014, at 2:00 pm in Courtroom 4D. (4)Within ten days, the Individual Merchant Plaintiffs shall file a letter with the court regarding their interpretation of paragraph 24 of Class Plaintiffs' proposed preliminary approval order. The Class Plaintiffs and Defendants shall have ten days to respond. (Court Reporter Victoria Torres-Butler.) (King, Alyssa) (Entered: 01/14/2014)
01/24/2014	312	PRETRIAL SCHEDULING ORDER. So Ordered by Judge Nicholas G. Garaufis on 1/21/2014. (Lee, Tiffeny) (Entered: 01/24/2014)
01/24/2014	313	MOTION for Leave to Electronically File Document under Seal by American Express Company, American Express Travel Related Services Company, Inc. (Attachments: # 1 Reply Memorandum of Law in Further Support of Defendants' Motion for Summary Judgment, # 2 Defendants' Reply to Plaintiffs' Rule 56.1 Counter-Statement of Material Facts in Opposition to Defendants' Motion for Summary Judgment)

(Chesler, Evan) (Entered: 01/24/2014)

02/04/2014 316 Letter MOTION for Leave to File Sur-Reply Memorandum of Law in Further Opposition to Defendants' Motion for Summary Judgment by United States of America. (Ewalt, Andrew) (Entered: 02/04/2014)

02/04/2014 317 RESPONSE in Opposition re 316 Letter MOTION for Leave to File Sur-Reply Memorandum of Law in Further Opposition to Defendants' Motion for Summary Judgment filed by American Express Company, American Express Travel Related Services Company, Inc. (Chesler, Evan) (Entered: 02/04/2014)

02/11/2014 318 ORDER denying 285 Motion to Consolidate for the Purposes of Trial. Ordered by Judge Nicholas G. Garaufis on 2/11/2014. (Chapin, Benjamin) (Entered: 02/11/2014)

02/12/2014 319 ORDER granting 316 Motion for Leave to File a sur-reply not exceeding 3 pages in length is granted.. Ordered by Judge Nicholas G. Garaufis on 2/4/2014. (Piper, Francine) (Entered: 02/12/2014)

02/12/2014 320 MEMORANDUM in Opposition re 281 Notice of MOTION for

		Summary Judgment and [Proposed] Order(Sur-Reply Memorandum of Law) filed by United States of America. (Ewalt, Andrew) (Entered: 02/12/2014)
02/20/2014	321	MEMORANDUM in Opposition re 281 Notice of MOTION for Summary Judgment and [Proposed] Order[PUBLIC VERSION] filed by United States of America. (Ewalt, Andrew) (Entered: 02/20/2014)
02/24/2014		SCHEDULING ORDER: Motion Hearing before Judge Nicholas G. Garaufis: The oral argument on summary judgment originally scheduled for 2:00 p.m. on March 19, 2014, will now commence at 3:00 p.m. on the same day. Ordered by Judge Nicholas G. Garaufis on 2/24/2014. (King, Alyssa) (Entered: 02/24/2014)
03/12/2014		SCHEDULING ORDER: Motion Hearing before Judge Nicholas G. Garaufis: At Defendants' request, and with the consent of the Government Plaintiffs and Merchant Plaintiffs, the oral argument on summary judgment scheduled for 3:00 p.m. on March 19, 2014, will now commence at 2:30 p.m. on the same day. Ordered by Judge Nicholas G. Garaufis on 3/12/2014. (Chapin, Benjamin)

		(Entered: 03/12/2014)
03/20/2014		Minute Entry for proceedings held before Judge Nicholas G. Garaufis: Hearing held on March 19, 2014, re: Defendants' 282 Motion for Summary Judgment. All parties present. Decision reserved. (Court Reporter Michele Nardone) (King, Alyssa) (Entered: 03/20/2014)
05/07/2014	369	MEMORANDUM & ORDER: Defendants' 281 Motion for Summary Judgment is DENIED. Defendant's reading of Leegin asks the court to go against clearly stated Second Circuit law allowing an antitrust plaintiff the option of proving either actual adverse effect or market power, without any indication from the Supreme Court or Second Circuit that it must do so. The court declines this invitation. The remaining issues, including whether Plaintiffs may ultimately succeed in proving that Defendants' anti-steering rules have actual adverse effect on competition and whether Defendants have market power, raise questions of material fact. Summary judgment is thus inappropriate. So Ordered by Judge Nicholas G. Garaufis on 5/7/2014. (Lee, Tiffeny) (Main Document 369 replaced on 7/11/2014 to correct clerical error on page 5 only)

(Entered: 05/07/2014)

06/20/2014 504 MOTION for Leave to Electronically File Document under Seal by United States of America. (Attachments: # 1 Plaintiffs' Pre-Trial Memorandum) (Ewalt, Andrew) (Entered: 06/20/2014)

06/20/2014 505 MOTION for Leave to Electronically File Document under Seal by American Express Company, American Express Travel Related Services Company, Inc. (Attachments: # 1 Defendants' Pretrial Memorandum (Sealed), # 2 Declaration of Kevin J. Orsini in Support of Defendants' Pretrial Memorandum (Sealed), # 3 Exhibit A to Orsini Declaration (Sealed), # 4 Exhibit B to Orsini Declaration (Sealed)) (Chesler, Evan) (Entered: 06/20/2014)

06/24/2014 510 ORDER denying 325 327 331 333 336 338 Plaintiffs' Motions in Limine and deferring ruling on 329 Defendants' Motion in Limine. For the reasons set forth herein, Plaintiffs' motions in limine are DENIED and a decision on Defendants' motion is RESERVED until the court and parties have had an opportunity to voir dire Ms. Schmitt concerning her qualifications and their relevance to

		the opinions to be offered at trial. Ordered by Judge Nicholas G. Garaufis on 6/24/2014. (Chapin, Benjamin) (Entered: 06/24/2014)
06/26/2014	512	REDACTION Plaintiffs' Pre-Trial Memorandum [Public Version] by United States of America (Vardner, Joseph) (Entered: 06/26/2014)
06/27/2014	514	REDACTION -- Defendants' Pretrial Memorandum [Public Version] by American Express Company, American Express Travel Related Services Company, Inc. (Chesler, Evan) (Entered: 06/27/2014)
07/07/2014	535	PRETRIAL ORDER. The parties' 447 Joint Pretrial Order is SO ORDERED. Ordered by Judge Nicholas G. Garaufis on 7/3/2014. (Chapin, Benjamin) (Entered: 07/07/2014)
07/08/2014		Minute Entry for proceedings held before Judge Nicholas G. Garaufis: Bench Trial begun on 7/7/2014. The parties were directed to update the court with the status of the trial clock at the end of each trial week. (Court Reporter Ronald Tolkin) (Chapin, Benjamin) (Entered: 07/08/2014)
07/09/2014		Minute Entry for proceedings held before Judge Nicholas G. Garaufis:

	Bench Trial held on 7/8/2014. (Court Reporter Ronald Tolkin) (Chapin, Benjamin) (Entered: 07/09/2014)
07/10/2014	Minute Entry for proceedings held before Judge Nicholas G. Garaufis: Bench Trial held on 7/9/2014. The parties were directed to: (1) provide the court with the exhibits to be used in examining or cross-examining witnesses on a daily, rather than weekly, basis; and (2) confer at the conclusion of each trial day to determine whether any inadvertent disclosures of sealed information have occurred that require redaction of the official transcript. (Court Reporter Ronald Tolkin) (Chapin, Benjamin) (Entered: 07/10/2014)
07/11/2014	Incorrect Document/Entry Information: Document 369 has been replaced to correct a clerical error on page 5 of the document this day and the NEF regenerated as to all parties. (Lee, Tiffeny) (Entered: 07/11/2014)
07/11/2014	Minute Entry for proceedings held before Judge Nicholas G. Garaufis: Bench Trial held on 7/10/2014. (Court Reporter Ronald Tolkin) (Chapin, Benjamin) (Entered: 07/11/2014)

07/11/2014	538	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on July 7, 2014, before Judge Garaufis. Court Reporter/Transcriber Ronald E. Tolkin, Official Court Reporter, Telephone number 718-613-2647. Email address: ronald_tolkin@nyed.uscourts.gov. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 8/1/2014. Redacted Transcript Deadline set for 8/11/2014. Release of Transcript Restriction set for 10/9/2014. (Tolkin, Ronald) (Entered: 07/11/2014)
07/11/2014	539	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on July 8, 2014, before Judge Garaufis. Court Reporter/Transcriber Ronald E. Tolkin, Official Court Reporter, Telephone number 718-613-2647. Email address: ronald_tolkin@nyed.uscourts.gov. Transcript may be viewed at the court public terminal or purchased through the Court

Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 8/1/2014. Redacted Transcript Deadline set for 8/11/2014. Release of Transcript Restriction set for 10/9/2014. (Tolkin, Ronald) (Entered: 07/11/2014)

07/11/2014 540 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on July 9, 2014, before Judge Garaufis. Court Reporter/Transcriber Ronald E. Tolkin, Official Court Reporter, Telephone number 718-613-2647. Email address: ronald_tolkin@nyed.uscourts.gov. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 8/1/2014. Redacted Transcript Deadline set for 8/11/2014. Release of Transcript Restriction set for 10/9/2014. (Tolkin, Ronald) (Entered: 07/11/2014)

07/11/2014 541 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of

		Proceedings held on July 10, 2014, before Judge Garaufis. Court Reporter/Transcriber Ronald E. Tolkin, Official Court Reporter, Telephone number 718-613-2647. Email address: ronald_tolkin@nyed.uscourts.gov. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 8/1/2014. Redacted Transcript Deadline set for 8/11/2014. Release of Transcript Restriction set for 10/9/2014. (Tolkin, Ronald) (Entered: 07/11/2014)
07/13/2014	545	Redaction of 538 Transcript,, (Tolkin, Ronald) (Entered: 07/13/2014)
07/15/2014		Minute Entry for proceedings held before Judge Nicholas G. Garaufis: Bench Trial held on 7/14/2014. At the parties' request, the court ordered that the courtroom be closed for the testimony of Plaintiffs' expert Professor Gary Ford to protect against disclosure of certain confidential and highly sensitive information. Before the transcript of Prof. Ford's testimony

		is made public, the Defendants may propose narrowly tailored redactions to exclude truly confidential information. To the extent the parties are unable to agree on redactions to the transcript, they may bring their dispute to the attention of the court. (Court Reporter Gene Rudolph) (Chapin, Benjamin) (Entered: 07/15/2014)
07/15/2014	549	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 07/14/2014 before Judge Nicholas G. Garaufis. Court Reporter/Transcriber Richard W. Barry, Telephone number 718-613-2505. Email address: rwbarrycourtreporter@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 8/5/2014. Redacted Transcript Deadline set for 8/15/2014. Release of Transcript Restriction set for 10/14/2014. (Barry, Richard) Modified on 8/6/2014 (DCP) (Entered: 07/15/2014)
07/16/2014		Minute Entry for proceedings held

	before Judge Nicholas G. Garaufis: Bench Trial held on 7/15/2014. (Court Reporter Richard Barry) (Chapin, Benjamin) (Entered: 07/16/2014)
07/17/2014	Minute Entry for proceedings held before Judge Nicholas G. Garaufis: Bench Trial held on 7/16/2014. (Court Reporter Richard Barry) (Chapin, Benjamin) (Entered: 07/17/2014)
07/21/2014	Minute Entry for proceedings held before Judge Nicholas G. Garaufis: Bench Trial held on 7/17/2014. (Court Reporter Richard Barry) (Chapin, Benjamin) (Entered: 07/21/2014)
07/22/2014	Minute Entry for proceedings held before Judge Nicholas G. Garaufis: Bench Trial held on 7/21/2014. (Court Reporter Lisa Schwam) (Chapin, Benjamin) (Entered: 07/22/2014)
07/23/2014	Minute Entry for proceedings held before Judge Nicholas G. Garaufis: Bench Trial held on 7/22/2014. (Court Reporter Lisa Schwam) (Chapin, Benjamin) (Entered: 07/23/2014)
07/28/2014	Minute Entry for proceedings held before Judge Nicholas G. Garaufis:Bench Trial held on

	7/23/2014. (Court Reporter Lisa Schwam) (Chapin, Benjamin) (Entered: 07/28/2014)
07/28/2014	Minute Entry for proceedings held before Judge Nicholas G. Garaufis: Bench Trial held on 7/24/2014. (Court Reporter Lisa Schwam) (Chapin, Benjamin) (Entered: 07/28/2014)
07/30/2014	Minute Entry for proceedings held before Judge Nicholas G. Garaufis: Bench Trial held on 7/29/2014. (Court Reporter Nicole Canales) (Chapin, Benjamin) (Entered: 07/30/2014)
07/31/2014	Minute Entry for proceedings held before Judge Nicholas G. Garaufis: Bench Trial held on 7/30/2014. (Court Reporter Nicole Canales.) (King, Alyssa) (Entered: 07/31/2014)
08/01/2014	Minute Entry for proceedings held before Judge Nicholas G. Garaufis: Bench Trial held on 7/31/2014 (Court Reporter Nicole Canales.) (Chapin, Benjamin) (Entered: 08/01/2014)
08/05/2014	Minute Entry for proceedings held before Judge Nicholas G. Garaufis: Bench Trial held on 8/4/2014. The court ordered that the courtroom would be sealed for the testimony of Pamela Codispoti and Scott Miller

		on Wednesday, August 6, 2014, and potentially continuing into Thursday, August 7, 2014, for good cause shown. (Court Reporter Sherry Bryant) (Chapin, Benjamin) (Entered: 08/05/2014)
08/06/2014		Minute Entry for proceedings held before Judge Nicholas G. Garaufis: Bench Trial held on 8/5/2014. (Court Reporter Sherry Bryant) (Chapin, Benjamin) (Entered: 08/06/2014)
08/07/2014		Minute Entry for proceedings held before Judge Nicholas G. Garaufis: Bench Trial held on 8/6/2014. (Court Reporter Sherry Bryant) (Chapin, Benjamin) (Entered: 08/07/2014)
08/11/2014		Minute Entry for proceedings held before Judge Nicholas G. Garaufis: Bench Trial held on 8/7/2014. (King, Alyssa) (Entered: 08/11/2014)
08/12/2014	584	Redaction of 538 Transcript,, (Tolkin, Ronald) (Entered: 08/12/2014)
08/12/2014	585	Redaction of 539 Transcript,, (Tolkin, Ronald) (Entered: 08/12/2014)
08/12/2014	586	Redaction of 540 Transcript,, (Tolkin, Ronald) (Entered: 08/12/2014)

08/12/2014	587	Redaction of 541 Transcript,, (Tolkin, Ronald) (Entered: 08/12/2014)
08/13/2014		Minute Entry for proceedings held before Judge Nicholas G. Garaufis: Bench Trial held on 8/11/2014. (Court Reporter Allan Sherman) (Chapin, Benjamin) (Entered: 08/13/2014)
08/14/2014		Minute Entry for proceedings held before Judge Nicholas G. Garaufis: Bench Trial held on 8/13/2014 (Court Reporter Allan Sherman) (Chapin, Benjamin) (Entered: 08/14/2014)
08/15/2014		Minute Entry for proceedings held before Judge Nicholas G. Garaufis: Bench Trial held on 8/15/2014 (Court Reporter Anthony Mancuso) (Chapin, Benjamin) (Entered: 08/15/2014)
08/17/2014	590	STIPULATION Regarding Non-Standard Card Acceptance Agreements and Merchant Acceptance of American Express by United States of America (Ewalt, Andrew) (Entered: 08/17/2014)
08/19/2014		Minute Entry for proceedings held before Judge Nicholas G. Garaufis: Bench Trial concluded on 8/18/2014. The parties' proposed findings of fact and conclusions of law, as well

as their post-trial legal briefs, shall be filed by September 18, 2014. Closing arguments are scheduled for October 9, 2014, at 10:00 a.m. in Courtroom 4D. (Court Reporter Holly Driscoll) (Chapin, Benjamin) (Entered: 08/19/2014)

09/08/2014 595 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on August 4, 2014, before Judge Nicholas G. Garaufis. Court Reporter/Transcriber Sherry Bryant, Telephone number 718-613-2636. Email address: sbryant102@verizon.net. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 9/29/2014. Redacted Transcript Deadline set for 10/9/2014. Release of Transcript Restriction set for 12/8/2014. (Bryant, Sherry) (Entered: 09/08/2014)

09/08/2014 596 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on August 5, 2014, before Judge Nicholas G. Garaufis. Court Reporter/Transcriber Sherry Bryant, Telephone number 718-613-2636. Email address:

sbryant102@verizon.net. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 9/29/2014. Redacted Transcript Deadline set for 10/9/2014. Release of Transcript Restriction set for 12/8/2014. (Bryant, Sherry) (Entered: 09/08/2014)

09/08/2014 597 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on August 6, 2014, before Judge Nicholas G. Garaufis. Court Reporter/Transcriber Sherry Bryant, Telephone number 718-613-2636. Email address: sbryant102@verizon.net. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 9/29/2014. Redacted Transcript Deadline set for 10/9/2014. Release of Transcript Restriction set for 12/8/2014. (Bryant, Sherry) (Entered: 09/08/2014)

09/08/2014 598 NOTICE OF FILING OF

		OFFICIAL TRANSCRIPT of Proceedings held on August 7, 2014, before Judge Nicholas G. Garaufis. Court Reporter/Transcriber Sherry Bryant, Telephone number 718-613-2636. Email address: sbryant102@verizon.net. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 9/29/2014. Redacted Transcript Deadline set for 10/9/2014. Release of Transcript Restriction set for 12/8/2014. (Bryant, Sherry) (Entered: 09/08/2014)
09/18/2014	600	MOTION for Leave to Electronically File Document under Seal by United States of America. (Attachments: # 1 Plaintiffs' Proposed Findings of Fact) (Carter, Thomas) (Entered: 09/18/2014)
09/18/2014	601	MOTION for Leave to Electronically File Document under Seal by United States of America. (Attachments: # 1 Plaintiffs' Post-Trial Memorandum of Law) (Carter, Thomas) (Entered: 09/18/2014)
09/18/2014	602	TRIAL BRIEF Plaintiffs' Proposed Conclusions of Law by United

		States of America (Carter, Thomas) (Entered: 09/18/2014)
09/18/2014	603	MOTION for Leave to Electronically File Document under Seal by American Express Company, American Express Travel Related Services Company, Inc. (Attachments: # 1 Defendants' Post-Trial Brief (Sealed)) (Chesler, Evan) (Entered: 09/18/2014)
09/19/2014	604	MOTION for Leave to Electronically File Document under Seal by American Express Company, American Express Travel Related Services Company, Inc. (Attachments: # 1 Defendants' Proposed Findings of Fact and Conclusions of Law (Sealed)) (Chesler, Evan) (Entered: 09/19/2014)
09/26/2014	605	REDACTION ("Defendants' Post-Trial Brief")[Public Version] by American Express Company, American Express Travel Related Services Company, Inc. (Chesler, Evan) (Entered: 09/26/2014)
09/26/2014	606	REDACTION of Plaintiffs' Post-Trial Memorandum [Public Version] by United States of America (Carter, Thomas) (Entered: 09/26/2014)
10/14/2014		Minute Entry for proceedings held

		before Judge Nicholas G. Garaufis: Closing Arguments held on 10/09/2014. The parties' presentations were marked for identification as detailed on the record. (Court Reporter Victoria Torres-Butler) (Chapin, Benjamin) (Entered: 10/14/2014)
10/16/2014	611	REDACTION of Plaintiffs' Proposed Findings of Fact [Public Version] by United States of America (Carter, Thomas) (Entered: 10/16/2014)
10/28/2014	612	REDACTION ("Defendants' Proposed Findings of Fact and Conclusions of Law")[Public Version] by American Express Company, American Express Travel Related Services Company, Inc. (Chesler, Evan) (Entered: 10/28/2014)
11/07/2014	613	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 07-28-14, before Judge Garaufis. Court Reporter/Transcriber Nicole Canales, Telephone number 718-613-2509. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File

redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". Redaction Request due 11/28/2014. Redacted Transcript Deadline set for 12/8/2014. Release of Transcript Restriction set for 2/5/2015. (Canales, Nicole) (Entered: 11/07/2014)

11/07/2014 614 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 07-29-14, before Judge Garaufis. Court Reporter/Transcriber Nicole Canales, Telephone number 718-613-2509. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". Redaction Request due 11/28/2014. Redacted Transcript Deadline set for 12/8/2014. Release of Transcript Restriction set for 2/5/2015. (Canales, Nicole) (Entered: 11/07/2014)

11/07/2014 615 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 07-30-14,

before Judge Garaufis. Court Reporter/Transcriber Nicole Canales, Telephone number 718-613-2509. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". Redaction Request due 11/28/2014. Redacted Transcript Deadline set for 12/8/2014. Release of Transcript Restriction set for 2/5/2015. (Canales, Nicole) (Entered: 11/07/2014)

11/07/2014 616 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 07-31-14, before Judge Garaufis. Court Reporter/Transcriber Nicole Canales, Telephone number 718-613-2509. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript"

located under "Other Filings - Other Documents". Redaction Request due 11/28/2014. Redacted Transcript Deadline set for 12/8/2014. Release of Transcript Restriction set for 2/5/2015. (Canales, Nicole) (Entered: 11/07/2014)

02/19/2015 619 DECISION (Findings of Fact and Conclusions of Law). For the reasons set forth in the accompanying Decision, the court concludes that Plaintiffs have proven by a preponderance of the evidence that the challenged restraints constitute an unlawful restraint on trade under Section 1 of the Sherman Act. Following briefing by the parties in accordance with the Scheduling Order issued contemporaneously with this Decision, the court will separately issue a Remedial Order and a Judgment after it determines the appropriate remedy. Ordered by Judge Nicholas G. Garaufis on 2/19/2015. (Day, Lori) (Entered: 02/19/2015)

02/19/2015 620 SCHEDULING ORDER: So that final judgment can be timely entered in this case, the court DIRECTS the parties to submit a joint, Proposed Remedial Order for the court's review that is consistent with the analysis set forth in the

Decision. The proposed injunction shall be filed within thirty (30) days of the date of entry of this Scheduling Order and shall be accompanied by a joint memorandum addressing why the Proposed Remedial Order is appropriate in this case. The parties' participation in negotiating and proposing an appropriate remedy shall not prejudice or waive any of their rights, including their rights to present arguments on appeal. To the extent the parties are unable to agree on a Proposed Remedial Order--and the court sincerely hopes they are able to agree--they shall file a joint submission indicating where the parties are in agreement and where the parties are not in agreement, and each party shall file a supporting memorandum explaining why the court should adopt its proposed remedy. If necessary, the court will itself craft an injunction that implements the Decision and renders American Express's contractual provisions compliant with the antitrust laws. Ordered by Judge Nicholas G. Garaufis on 2/19/2015. (Goldstein, Ryan) (Entered: 02/19/2015)

03/23/2015 621 MEMORANDUM in Support re 620

Scheduling Order,,,,, Joint Submission As To Remedy filed by United States of America. (Attachments: # 1 Appendix Appendix 1 to Joint Submission As To Remedy, # 2 Appendix Appendix 2 to Joint Submission As To Remedy, # 3 Appendix Appendix 3 to Joint Submission As To Remedy) (Hamer, Mark) (Entered: 03/23/2015)

03/23/2015 622 MEMORANDUM in Support re 620 Scheduling Order,,,,, Plaintiffs' Memorandum In Support of Proposed Final Judgment and Remedial Order As To The American Express Defendants filed by United States of America. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2) (Hamer, Mark) (Entered: 03/23/2015)

03/23/2015 623 MEMORANDUM in Support re 620 Scheduling Order,,,,, ("Memorandum of Law in Support of Defendants' Proposed Final Judgment and Order Entering Injunction") [Public Redacted Version] filed by American Express Company, American Express Travel Related Services Company, Inc. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E) (Chesler, Evan) (Entered: 03/23/2015)

03/23/2015	624	MOTION for Leave to Electronically File Document under Seal by American Express Company, American Express Travel Related Services Company, Inc. (Attachments: # 1 Memorandum of Law in Support of Defendants' Proposed Final Judgment and Order Entering Injunction (Confidential Version)) (Chesler, Evan) (Entered: 03/23/2015)
03/25/2015	625	Letter MOTION for Leave to File to submit a reply to the Government's Memorandum in Support of Proposed Final Judgment and Remedial Order as to the American Express Defendants. (Dkt. No. 622.) by American Express Company, American Express Travel Related Services Company, Inc. (Chesler, Evan) (Entered: 03/25/2015)
03/25/2015		ORDER granting in part American Express's 625 Motion for Leave to File Reply. The motion is GRANTED IN PART. American Express is granted leave to file a reply of not more than 20 pages to the Government's Memorandum in Support of Proposed Final Judgment and Remedial Order, by no later than April 1, 2015. The Government is sua sponte granted leave to file a reply, if it chooses, of not more than 20 pages to American

Express's Memorandum of Law in Support of Defendants' Proposed Final Judgment and Order Entering Injunction, by no later than April 1, 2015. No sur-replies will be permitted. Ordered by Judge Nicholas G. Garaufis on 3/25/2015. (Goldstein, Ryan) (Entered: 03/25/2015)

04/01/2015 626 MEMORANDUM in Support of Plaintiffs' Proposed Final Judgment and Remedial Order filed by United States of America. (Attachments: # 1 Exhibit 1) (Vardner, Joseph) (Entered: 04/01/2015)

04/01/2015 627 MEMORANDUM in Support ("Reply Memorandum Of Law In Further Support Of Defendants' Proposed Final Judgment And Order Entering Injunction") filed by American Express Company, American Express Travel Related Services Company, Inc. (Chesler, Evan) (Entered: 04/01/2015)

04/10/2015 631 NOTICE by Non-Party Merchants Comments Concerning Proposed Remedy (Shinder, Jeffrey) (Entered: 04/10/2015)

04/15/2015 634 NOTICE by Class Plaintiffs in 11-md-2221 Class Plaintiffs' Submission with Respect to the Government's Proposed Judgment (Reinhardt, Mark) (Entered:

04/15/2015)

04/15/2015 635 NOTICE by Southwest Airlines Co. Regarding Proposed Relief (Atkins, Alden) (Entered: 04/15/2015)

04/17/2015 636 REPLY in Support Plaintiffs' Memorandum in Reply to Non-Party Filings Regarding Remedy filed by United States of America. (Vardner, Joseph) (Entered: 04/17/2015)

04/17/2015 637 NOTICE by American Express Company, American Express Travel Related Services Company, Inc. re 620 Scheduling Order,,,,, ("Response Of the American Express Defendants To Non-Party Comments On The Proposed Final Judgment And Order Entering Injunction") (Chesler, Evan) (Entered: 04/17/2015)

04/30/2015 638 ORDER ENTERING PERMANENT INJUNCTION AS TO THE AMERICAN EXPRESS DEFENDANTS. See attached. Ordered by Judge Nicholas G. Garaufis on 4/30/2015. (Goldstein, Ryan) (Entered: 04/30/2015)

04/30/2015 639 MEMORANDUM. As set forth in the attached, and as embodied in the court's separate Order Entering Permanent Injunction as to the American Express Defendants, the

court adopts many of the proposals made by the Government with respect to the proper scope of injunctive relief in this case, with some exceptions, and with certain modifications. Ordered by Judge Nicholas G. Garaufis on 4/30/2015. (Goldstein, Ryan) (Entered: 04/30/2015)

04/30/2015 640 VACATED JUDGMENT in favor of State of Arizona, State of Connecticut, State of Idaho, State of Illinois, State of Iowa, State of Maryland, State of Michigan, State of Missouri, State of Montana, State of Nebraska, State of New Hampshire, State of Ohio, State of Rhode Island, State of Tennessee, State of Texas, State of Utah, State of Vermont, United States of America against American Express Company, American Express Travel Related Services Company, Inc. Ordered by Judge Nicholas G. Garaufis on 4/30/2015. (Goldstein, Ryan) (Main Document 640 replaced on 1/13/2017) (Lee, Tiffeny). See USCA,2nd Ct. Mandate, Document 698 (Entered: 04/30/2015)

05/01/2015 641 MOTION to Stay re 640 Judgment,, ("Notice Of Defendants' Motion To Stay Pending Appeal") by American Express Company, American

		Express Travel Related Services Company, Inc. (Attachments: # 1 Proposed Order) (Chesler, Evan) (Entered: 05/01/2015)
05/01/2015	642	MEMORANDUM in Support re 641 MOTION to Stay re 640 Judgment,, ("Notice Of Defendants' Motion To Stay Pending Appeal") ("Defendants' Memorandum Of Law In Support Of Defendants' Motion To Stay Pending Appeal") filed by American Express Company, American Express Travel Related Services Company, Inc. (Chesler, Evan) (Entered: 05/01/2015)
05/11/2015	654	RESPONSE in Opposition re 641 MOTION to Stay re 640 Judgment,, ("Notice Of Defendants' Motion To Stay Pending Appeal") filed by Home Depot U.S.A., Inc. (Lowrey, Frank) (Entered: 05/11/2015)
05/11/2015	655	RESPONSE in Opposition re 641 MOTION to Stay re 640 Judgment,, ("Notice Of Defendants' Motion To Stay Pending Appeal") filed by Southwest Airlines Co.. (Atkins, Alden) (Entered: 05/11/2015)
05/11/2015	656	MOTION to Seal Document, MOTION for Leave to Electronically File Document under Seal Individual Merchant Plaintiffs' Brief in Opposition to Amex's Motion to Stay Pending Appeal by

		Individual Plaintiffs in 11-md-2221. (Attachments: # 1 Memorandum in Opposition, # 2 Exhibit 1 - US v. Amex Case, # 3 Exhibit 2 - Walgreens Declaration, # 4 Exhibit 3 - Kroger Declaration, # 5 Exhibit 4 - Burlington Declaration, # 6 Exhibit 5 - Spirit Declaration) (Arnold, Richard) (Entered: 05/11/2015)
05/11/2015	657	RESPONSE in Opposition re 641 MOTION to Stay re 640 Judgment,, ("Notice Of Defendants' Motion To Stay Pending Appeal") filed by Sears Holdings Corporation. (Attachments: # 1 Exhibit 1., # 2 Exhibit 2., # 3 Exhibit 3., # 4 Exhibit 4., # 5 Exhibit 5.) (Shinder, Jeffrey) (Entered: 05/11/2015)
05/11/2015	658	RESPONSE in Opposition re 641 MOTION to Stay re 640 Judgment,, ("Notice Of Defendants' Motion To Stay Pending Appeal") Memorandum of Law filed by United States of America. (Vardner, Joseph) (Entered: 05/11/2015)
05/13/2015	659	STIPULATION regarding Plaintiff States Fees and Costs by State of Ohio (Gentile, Mitchell) (Entered: 05/13/2015)
05/14/2015	660	ORDER re: parties' 659 stipulation regarding Plaintiff States' fees and costs. The stipulation is so-ordered.

		Ordered by Judge Nicholas G. Garaufis on 5/14/2015. (Goldstein, Ryan) (Entered: 05/14/2015)
05/15/2015	661	REPLY in Support re 641 MOTION to Stay re 640 Judgment,, ("Notice Of Defendants' Motion To Stay Pending Appeal") ("Defendants' Reply Memorandum In Support Of Defendants' Motion To Stay Pending Appeal") filed by American Express Company, American Express Travel Related Services Company, Inc. (Chesler, Evan) (Entered: 05/15/2015)
05/15/2015	662	AFFIDAVIT/DECLARATION in Support re 641 MOTION to Stay re 640 Judgment,, ("Notice Of Defendants' Motion To Stay Pending Appeal") ("Declaration Of Kevin J. Orsini In Support Of Defendants' Reply In Support Of Defendants' Motion To Stay Pending Appeal") filed by American Express Company, American Express Travel Related Services Company, Inc. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3) (Chesler, Evan) (Entered: 05/15/2015)
05/19/2015	663	ORDER denying Defendants' 641 Motion to Stay Pending Appeal. As set forth in the accompanying Memorandum and Order,

		Defendants' motion to stay pending appeal is DENIED. However, in order to permit Defendants to seek a stay pending appeal from the Second Circuit, the court sua sponte enters a temporary stay of the Permanent Injunction for a period of 30 days from the date of entry of this Memorandum and Order. Ordered by Judge Nicholas G. Garaufis on 5/19/2015. (Goldstein, Ryan) (Entered: 05/19/2015)
05/21/2015	664	NOTICE OF APPEAL as to 640 Judgment,, 638 Permanent Injunction, 619 Findings of Fact & Conclusions of Law,, 639 Memorandum & Opinion, by American Express Company, American Express Travel Related Services Company, Inc. Filing fee $ 505, receipt number 0207-7759546. (Chesler, Evan) (Entered: 05/21/2015)
05/21/2015		Electronic Index to Record on Appeal sent to US Court of Appeals. 664 Notice of Appeal, Documents are available via Pacer. For docket entries without a hyperlink or for documents under seal, contact the court and we'll arrange for the document(s) to be made available to you. (McGee, Mary Ann) (Entered: 05/21/2015)

05/29/2015 665 ORDER of USCA as to 664 Notice of Appeal, filed by American Express Company, American Express Travel Related Services Company, Inc. IT IS HEREBY ORDERED that the Appellants motion for a stay of the permanent injunction, issued by the District Court on April 30, 2015, pending the Courts determination of this appeal is REFERRED to a three-judge motions panel sitting on June 16, 2015Certified Copy issued 5/29/15. (McGee, Mary Ann) (Entered: 05/29/2015)

06/09/2015 666 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 7-21-2015, before Judge Garaufis. Court Reporter/Transcriber Lisa Schwam, Telephone number 718-613-2268. Email address: LisaSchwam@aol.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". Redaction Request due 6/30/2015. Redacted Transcript Deadline set

for 7/10/2015. Release of Transcript Restriction set for 9/7/2015. (Schwam, Lisa) (Entered: 06/09/2015)

06/09/2015 667 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 7-22-2014, before Judge Garaufis. Court Reporter/Transcriber Lisa Schwam, Telephone number 718-613-2268. Email address: LisaSchwam@aol.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". Redaction Request due 6/30/2015. Redacted Transcript Deadline set for 7/10/2015. Release of Transcript Restriction set for 9/7/2015. (Schwam, Lisa) (Entered: 06/09/2015)

06/09/2015 668 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 7-23-2014, before Judge Garaufis. Court Reporter/Transcriber Lisa Schwam, Telephone number 718-613-2268.

Email address: LisaSchwam@aol.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". Redaction Request due 6/30/2015. Redacted Transcript Deadline set for 7/10/2015. Release of Transcript Restriction set for 9/7/2015. (Schwam, Lisa) (Entered: 06/09/2015)

06/09/2015 669 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 7-24-2014, before Judge Garaufis. Court Reporter/Transcriber Lisa Schwam, Telephone number 718-613-2268. Email address: LisaSchwam@aol.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request -

Transcript" located under "Other Filings - Other Documents". Redaction Request due 6/30/2015. Redacted Transcript Deadline set for 7/10/2015. Release of Transcript Restriction set for 9/7/2015. (Schwam, Lisa) (Entered: 06/09/2015)

06/09/2015 670 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on August 18, 2014, before Judge Garaufis. Court Reporter/Transcriber H. Driscoll, Telephone number 718-613-2274. Email address: hdrisc@aol.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". Redaction Request due 6/30/2015. Redacted Transcript Deadline set for 7/10/2015. Release of Transcript Restriction set for 9/7/2015. (Driscoll, Holly) (Entered: 06/09/2015)

06/10/2015 671 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 08/14/2014,

before Judge Garaufis. Court Reporter/Transcriber Anthony Mancuso, Telephone number 718-613-2419. Email address: anthonymancuso65@msn.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". Redaction Request due 7/1/2015. Redacted Transcript Deadline set for 7/13/2015. Release of Transcript Restriction set for 9/8/2015. (Mancuso, Anthony) (Entered: 06/10/2015)

06/10/2015 672 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 08-13-2014, before Judge Nicholas G Garaufis. Court Reporter/Transcriber Allan R Sherman, Telephone number 718-613-2529. Email address: asher99983@aol.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that

date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". Redaction Request due 7/1/2015. Redacted Transcript Deadline set for 7/13/2015. Release of Transcript Restriction set for 9/8/2015. (Sherman, Allan) (Entered: 06/10/2015)

06/10/2015 673 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 08-11-2014, before Judge Nicholas G Garaufis. Court Reporter/Transcriber Allan R Sherman, Telephone number 718-613-2529. Email address: asher99983@aol.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". Redaction Request due 7/1/2015. Redacted Transcript Deadline set for 7/13/2015. Release of Transcript Restriction set for 9/8/2015. (Sherman, Allan) (Entered:

06/10/2015)

06/10/2015 674 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 07/07/2014, before Judge Garaufis. Court Reporter/Transcriber Ron Tolkin. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". (Redaction Request due 7/1/2015., Redacted Transcript Deadline set for 7/13/2015., Release of Transcript Restriction set for 9/8/2015.) (Mahoney, Brenna) (Entered: 06/10/2015)

06/10/2015 675 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 07/08/2014, before Judge Garaufis. Court Reporter/Transcriber Ron Tolkin. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File

redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". (Redaction Request due 7/1/2015., Redacted Transcript Deadline set for 7/13/2015., Release of Transcript Restriction set for 9/8/2015.) (Mahoney, Brenna) (Entered: 06/10/2015)

06/10/2015 676 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 07/09/2014, before Judge Garaufis. Court Reporter/Transcriber Ron Tolkin. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". (Redaction Request due 7/1/2015., Redacted Transcript Deadline set for 7/13/2015., Release of Transcript Restriction set for 9/8/2015.) (Mahoney, Brenna) (Entered: 06/10/2015)

06/10/2015 677 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 07/10/2014, before Judge Garaufis. Court

Reporter/Transcriber Ron Tolkin. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". (Redaction Request due 7/1/2015., Redacted Transcript Deadline set for 7/13/2015., Release of Transcript Restriction set for 9/8/2015.) (Mahoney, Brenna) (Entered: 06/10/2015)

06/10/2015 678 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 08/04/2014, before Judge Garaufis. Court Reporter/Transcriber Sherry Bryant. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". (Redaction Request due 7/1/2015., Redacted Transcript

Deadline set for 7/13/2015., Release of Transcript Restriction set for 9/8/2015.) (Mahoney, Brenna) (Entered: 06/10/2015)

06/10/2015 679 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 08/06/2014, before Judge Garaufis. Court Reporter/Transcriber Sherry Bryant. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". (Redaction Request due 7/1/2015., Redacted Transcript Deadline set for 7/13/2015., Release of Transcript Restriction set for 9/8/2015.) (Mahoney, Brenna) (Entered: 06/10/2015)

06/10/2015 680 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 08/07/2014, before Judge Garaufis. Court Reporter/Transcriber Sherry Bryant. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the

deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". (Redaction Request due 7/1/2015., Redacted Transcript Deadline set for 7/13/2015., Release of Transcript Restriction set for 9/8/2015.) (Mahoney, Brenna) (Entered: 06/10/2015)

06/10/2015 681 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 08/11/2014, before Judge Garaufis. Court Reporter/Transcriber Allan Sherman. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". (Redaction Request due 7/1/2015., Redacted Transcript Deadline set for 7/13/2015., Release of Transcript Restriction set for 9/8/2015.) (Mahoney, Brenna) (Entered: 06/10/2015)

06/10/2015 682 NOTICE OF FILING OF

OFFICIAL TRANSCRIPT of Proceedings held on 08/13/2014, before Judge Garaufis. Court Reporter/Transcriber Allan Sherman. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". (Redaction Request due 7/1/2015., Redacted Transcript Deadline set for 7/13/2015., Release of Transcript Restriction set for 9/8/2015.) (Mahoney, Brenna) (Entered: 06/10/2015)

06/10/2015 683 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 07/14/2014, before Judge Garaufis. Court Reporter/Transcriber Richard Barry. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript"

located under "Other Filings - Other Documents". (Redaction Request due 7/1/2015., Redacted Transcript Deadline set for 7/13/2015., Release of Transcript Restriction set for 9/8/2015.) (Mahoney, Brenna) Modified on 6/10/2015 (Mahoney, Brenna). (Entered: 06/10/2015)

06/10/2015 684 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 07/15/2014, before Judge Garaufis. Court Reporter/Transcriber Richard Barry. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". (Redaction Request due 7/1/2015., Redacted Transcript Deadline set for 7/13/2015., Release of Transcript Restriction set for 9/8/2015.) (Mahoney, Brenna) Modified on 6/10/2015 (Mahoney, Brenna). (Entered: 06/10/2015)

06/10/2015 685 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 07/16/2014, before Judge Garaufis. Court

Reporter/Transcriber Richard Barry. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". (Redaction Request due 7/1/2015., Redacted Transcript Deadline set for 7/13/2015., Release of Transcript Restriction set for 9/8/2015.) (Mahoney, Brenna) (Entered: 06/10/2015)

06/10/2015 686 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 07/17/2014, before Judge Garaufis. Court Reporter/Transcriber Richard Barry. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". (Redaction Request due 7/1/2015., Redacted Transcript

		Deadline set for 7/13/2015., Release of Transcript Restriction set for 9/8/2015.) (Mahoney, Brenna) (Entered: 06/10/2015)
06/19/2015	687	ORDER of USCA as to 664 Notice of Appeal, filed by American Express Company, American Express Travel Related Services Company, Inc. Appellants move for a stay pending appeal of the District Court's injunction, and Movants' request leave to file, as amicus curiae, memoranda in opposition to Appellants motion to stay. Appellants motion is DENIED. It is further ORDERED thatMovants motions are DENIED as moot. It is also Ordered that the consideration of this appeal is expedited, on a schedule to be determined by the Clerk of Court. Certified Copy Issued: 6/16/15. (McGee, Mary Ann) (Entered: 06/19/2015)
11/10/2015	688	Letter MOTION for Leave to File Motion to Enforce Compliance with Permanent Injunction and Set Briefing Schedule by United States of America. (Matelson, Bennett) (Entered: 11/10/2015)
11/10/2015		ORDER granting Government's 688 Motion for Leave to File. The motion is GRANTED, and the court so-orders the parties' agreed-upon

briefing schedule. The parties shall limit their opening submissions to ten pages double-spaced, and the Government shall limit its reply submission to five pages double-spaced. The parties are encouraged to address the issues succinctly and with brevity. Ordered by Judge Nicholas G. Garaufis on 11/10/2015. (Goldstein, Ryan) (Entered: 11/10/2015)

11/16/2015 689 MOTION for Leave to Electronically File Document under Seal Motion to Enforce Permanent Injunction by United States of America. (Attachments: # 1 Notice of Motion, # 2 Memorandum in Support, # 3 Declaration Matelson Declaration, # 4 Exhibit Exhibit A, # 5 Exhibit Exhibit B, # 6 Exhibit Exhibit C, # 7 Exhibit Exhibit D) (Matelson, Bennett) (Entered: 11/16/2015)

11/18/2015 690 MOTION for Leave to Electronically File Document under Seal Letter to Hon. Nicholas G. Garaufis by Kevin J. Orsini and Exhibits by American Express Company, American Express Travel Related Services Company, Inc. (Attachments: # 1 Letter to Hon. Nicholas G. Garaufis from Kevin J. Orsini, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C) (Orsini, Kevin) (Entered: 11/18/2015)

11/23/2015	691	REDACTION of Plaintiffs' Memorandum in Support of Motion to Enforce Permanent Injunction [Public Version] by United States of America (Matelson, Bennett) (Entered: 11/23/2015)
11/23/2015	692	MOTION for Leave to Electronically File Document under Seal by American Express Company, American Express Travel Related Services Company, Inc. (Attachments: # 1 Memorandum in Opposition Defendants' Memorandum of Law in Opposition to the Government's Motion to Enforce Permanent Injunction, # 2 Declaration Declaration of Erin K. McConnell, # 3 Exhibit Exhibit 1 to Declaration of Erin K. McConnell, # 4 Exhibit Exhibit 2 to Declaration of Erin K. McConnell, # 5 Exhibit Exhibit 3 to Declaration of Erin K. McConnell) (Orsini, Kevin) (Entered: 11/23/2015)
12/01/2015	693	REPLY in Support of Motion to Enforce Permanent Injunction filed by United States of America. (Matelson, Bennett) (Entered: 12/01/2015)
12/07/2015	694	REDACTION of Defendants' Memorandum of Law in Opposition to the Government's Motion to Enforce Permanent Injunction by

American Express Company, American Express Travel Related Services Company, Inc. (Orsini, Kevin) (Entered: 12/07/2015)

12/07/2015 695 DECLARATION of Erin K. McConnell in Support of Defendants' Memorandum of Law in Opposition to the Government's Motion to Enforce Permanent Injunction [Public Version] by American Express Company, American Express Travel Related Services Company, Inc. (Orsini, Kevin) (Entered: 12/07/2015)

12/15/2015 696 ORDER re: Plaintiffs' Motion to Enforce Permanent Injunction. For the reasons set forth in the accompanying Order, the court rejects Defendants' interpretation of Paragraph III.B.2 with respect to Defendants' existing co-brand merchants, GRANTS Plaintiffs' motion to enforce the terms of the Permanent Injunction with respect to those merchants, and DIRECTS Defendants promptly to provide proper notice to their co-brand merchants consistent with this Order. Ordered by Judge Nicholas G. Garaufis on 12/15/2015. (Goldstein, Ryan) (Entered: 12/15/2015)

12/18/2015 697 ORDER of USCA as to 664 Notice of

	Appeal, filed by American Express Company, American Express Travel Related Services Company, Inc. Pending decision in United States v. Am. Express Co., No. 15-1672, the Court on its own motion hereby orders a temporary stay of the Order of the United States District Court for the Eastern District of New York dated April 30, 2015 entering a Permanent Injunction as to the American Express Defendants in United States v. Am. Express Co., No. 10-cv-4496 (NGG) (RER). See Landis v. N. Am. Co., 299 U.S. 248, 254 (1936). The Court further orders a temporary stay in the District Court of any and all matters related to this litigation. Certified Copy issued: 12/18/15. (McGee, Mary Ann) (Entered: 12/18/2015)
09/07/2016	ORDER granting 689 Motion for Leave to Electronically File Document under Seal. Ordered by Magistrate Judge Ramon E. Reyes, Jr on 9/7/2016. (Vertus, Miriam) (Entered: 09/07/2016)
09/07/2016	ORDER granting 690 Motion for Leave to Electronically File Document under Seal; granting 692 Motion for Leave to Electronically File Document under Seal. Ordered by Magistrate Judge Ramon E.

		Reyes, Jr on 9/7/2016. (Vertus, Miriam) (Entered: 09/07/2016)
01/12/2017	698	MANDATE of USCA as to 664 Notice of Appeal, filed by American Express Company, American Express Travel Related Services Company, Inc. IT IS HEREBY ORDERED, ADJUDGED and DECREED that the District Court's judgment is REVERSED and the case is REMANDED with instructions to enter judgment in favor of Amex. Issued as Mandate: 1/12/17. USCA #15-1672. (Attachments: # 1 Opinion) (McGee, Mary Ann) (Entered: 01/12/2017)
01/20/2017	699	ORDER: In accordance with the mandate of the United States Court of Appeals for the Second Circuit, issued January 12, 2017, the court dismisses the Amended Complaint. (See Mandate(Dkt. 698).) The Clerk of Court is respectfully DIRECTED to enter judgment for Defendants. So Ordered by Judge Nicholas G. Garaufis on 1/19/2017. (fwd'd for jgm) (Lee, Tiffeny) (Entered: 01/20/2017)
01/25/2017	700	CLERK'S JUDGMENT that in accordance with the mandate of the United States Court of Appeals for the Second Circuit, issued January 12, 2017, the Court dismisses the

Amended Complaint; (See Mandate Dkt. 698).); and that judgment is hereby entered for Defendants American Express Company and American Express Travel Related Services Company, Inc. Signed Douglas C. Palmer, Clerk of Court by Janet Hamilton, Deputy Clerk on 1/24/2017. (Lee, Tiffeny) (Entered: 01/25/2017)

RELEVANT DOCKET ENTRIES

United States of America, et al. v. American Express Company, et al.,
U.S. Court of Appeals for the Second Circuit,
Case No. 15-1672

05/21/2015	2	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellants American Express Company and American Express Travel Related Services Company, Inc., FILED. [1516695] [15-1672] [Entered: 05/22/2015 01:53 PM]
05/21/2015	4	DISTRICT COURT ORDER, dated 02/19/2015, RECEIVED. [1516707] [15-1672] [Entered: 05/22/2015 02:01 PM]
05/21/2015	5	DISTRICT COURT ORDER, dated 04/30/2015, RECEIVED. [1516710] [15-1672] [Entered: 05/22/2015 02:02 PM]
05/21/2015	6	DISTRICT COURT MEMORANDUM, dated 04/30/2015, RECEIVED. [1516712] [15-1672] [Entered: 05/22/2015 02:03 PM]
05/21/2015	7	DISTRICT COURT JUDGMENT, dated 04/30/2015, RECEIVED. [1516713] [15-1672] [Entered: 05/22/2015 02:04 PM]
05/21/2015	8	ELECTRONIC INDEX, in lieu of

		record, FILED. [1516714] [15-1672] [Entered: 05/22/2015 02:04 PM]
05/26/2015	17	EMERGENCY MOTION, to stay, on behalf of Appellant American Express Travel Related Services Company, Inc. and American Express Company, FILED. Service date 05/26/2015 by CM/ECF. [1517914] [15-1672]--[Edited 05/27/2015 by YL] [Entered: 05/26/2015 06:37 PM]
05/29/2015	32	CERTIFIED ORDER, dated 05/29/2015, to EDNY(Brooklyn), ISSUED. [1520968] [15-1672] [Entered: 05/29/2015 04:19 PM]
06/05/2015	58	OPPOSITION TO MOTION, to stay [17], on behalf of Appellee United States of America, FILED. Service date 06/05/2015 by CM/ECF. [1526011] [15-1672] [Entered: 06/05/2015 02:29 PM]
06/11/2015	96	REPLY TO OPPOSITION [58], on behalf of Appellant American Express Company and American Express Travel Related Services Company, Inc., FILED. Service date 06/11/2015 by CM/ECF. [1530967][96] [15-1672] [Entered: 06/11/2015 07:29 PM]
06/16/2015	104	MOTION ORDER, denying motion to stay pending appeal

		[17] filed by Appellants American Express Company and American Express Travel Related Services Company, Inc.; denying as moot motions to file amicus curiae brief [79] [80], [89], by GC, DAL, GEL, FILED. [1533683][104] [15-1672] [Entered: 06/16/2015 02:49 PM]
06/16/2015	105	CERTIFIED ORDER, dated 06/16/2015, to United States District Court for the Eastern District of New York, ISSUED. [1533688] [15-1672]--[Edited 06/18/2015 by YL] [Entered: 06/16/2015 02:52 PM]
08/03/2015	128	SPECIAL APPENDIX, on behalf of Appellant American Express Company and American Express Travel Related Services Company, Inc., FILED. Service date 08/03/2015 by CM/ECF. [1568103] [15-1672] [Entered: 08/03/2015 09:43 PM]
08/03/2015	140	SEALED PAGE PROOF BRIEF, on behalf of Appellant American Express Company and American Express Travel Related Services Company, Inc., FILED. [1573276] [15-1672] [Entered: 08/11/2015 09:59 AM]
08/05/2015	133	PAGE PROOF BRIEF, on behalf of Appellant American Express Company and American Express

		Travel Related Services Company, Inc., FILED. Service date 08/05/2015 by CM/ECF. [1569764] [15-1672] [Entered: 08/05/2015 01:06 PM]
08/10/2015	135	AMICUS BRIEF, on behalf of Joseph Gregory Sidak, Robert D Willig, David J Teece, Keith Hylton, FILED. Service date 08/10/2015 by CM/ECF. [1573083] [15-1672] [Entered: 08/10/2015 06:34 PM]
09/14/2015	166	AMICUS BRIEF, Ahold U.S.A., Inc., Albertsons LLC, BI-LO LLC, CVS Health, Inc., H.E. Butt Grocery Co., HyVee, Inc., Meijer, Inc., Publix Super Markets, Inc., Raley's, Rite-Aid Corp., Safeway Inc., SuperValu, Inc., The Great Atlantic & Pacific Tea Company, Inc., The Kroger Co. and Walgreen Co., FILED. Service date 09/14/2015 by CM/ECF. [1597566] [15-1672] [Entered: 09/14/2015 02:09 PM]
09/14/2015	171	PAGE PROOF BRIEF, on behalf of Appellee United States of America, FILED. Service date 09/14/2015 by 3rd party, CM/ECF. [1597955] [15-1672] [Entered: 09/14/2015 04:58 PM]
09/14/2015	190	SEALED BRIEF, on behalf of Appellee United States of

America, FILED. [1601519] [15-1672] [Entered: 09/18/2015 09:47 AM]

09/17/2015 186 CURED DEFECTIVE BRIEF [176], [171], on behalf of Appellee United States of America, FILED. [1600631] [15-1672] [Entered: 09/17/2015 10:01 AM]

09/17/2015 187 AMICUS BRIEF, Home Depot USA, Inc., FILED. Service date 09/14/2015 by CM/ECF. [1601108] [15-1672] [Entered: 09/17/2015 03:04 PM]

09/18/2015 195 AMICUS BRIEF, on behalf of Movant Ahold U.S.A., Inc., Albertsons LLC, BI-LO LLC, CVS Health, Inc., H.E. Butt Grocery Co., HyVee, Inc., Meijer, Inc., Publix Super Markets, Inc., Raley's, Rite-Aid Corp., Safeway Inc., SuperValu, Inc., The Great Atlantic & Pacific Tea Company, Inc., The Kroger Co. and Walgreen Co., , FILED. Service date 09/18/2015 by CM/ECF. [1601961] [15-1672] [Entered: 09/18/2015 01:05 PM]

09/21/2015 219 MOTION TO FILE AMICUS CURIAE BRIEF, on behalf of Non-Party Filer(s), FILED. Service date09/21/2015 by email. [1603543] [15-1672] [Entered: 09/21/2015 06:05 PM]

10/02/2015	279	SEALED DEFERRED APPENDIX, Volume 5 of 10, on behalf of Appellee United States of America, FILED. [1626460] [15-1672] [Entered: 10/23/2015 11:39 AM]
10/05/2015	245	PAGE PROOF REPLY BRIEF, on behalf of Appellant American Express Company and American Express Travel Related Services Company, Inc., FILED. Service date 10/05/2015 by CM/ECF. [1613242] [15-1672] [Entered: 10/05/2015 07:48 PM]
10/15/2015	248	DEFERRED APPENDIX, volume 1 of 10, on behalf of Appellant American Express Company and American Express Travel Related Services Company, Inc., FILED. Service date 10/15/2015 by CM/ECF. [1620579] [15-1672] [Entered: 10/15/2015 09:24 PM]
10/15/2015	249	DEFERRED APPENDIX, volume 2 of 10, on behalf of Appellant American Express Company and American Express Travel Related Services Company, Inc., FILED. Service date 10/15/2015 by CM/ECF. [1620580] [15-1672] [Entered: 10/15/2015 09:27 PM]
10/15/2015	250	DEFERRED APPENDIX, volume 3 of 10, on behalf of Appellant American Express Company and

		American Express Travel Related Services Company, Inc., FILED. Service date 10/15/2015 by CM/ECF. [1620581] [15-1672] [Entered: 10/15/2015 09:30 PM]
10/15/2015	251	DEFERRED APPENDIX, volume 4 of 10, on behalf of Appellant American Express Company and American Express Travel Related Services Company, Inc., FILED. Service date 10/15/2015 by CM/ECF. [1620582] [15-1672] [Entered: 10/15/2015 09:32 PM]
10/15/2015	252	DEFERRED APPENDIX, volume 5 of 10, on behalf of Appellant American Express Company and American Express Travel Related Services Company, Inc., FILED. Service date 10/15/2015 by CM/ECF. [1620583] [15-1672] [Entered: 10/15/2015 09:33 PM]
10/15/2015	253	DEFERRED APPENDIX, volume 6 of 10, on behalf of Appellant American Express Company and American Express Travel Related Services Company, Inc., FILED. Service date 10/15/2015 by CM/ECF. [1620584] [15-1672] [Entered: 10/15/2015 09:35 PM]
10/15/2015	254	DEFERRED APPENDIX, volume 7 of 10, on behalf of Appellant American Express Company and American Express Travel Related

		Services Company, Inc., FILED. Service date 10/15/2015 by CM/ECF. [1620585] [15-1672] [Entered: 10/15/2015 09:37 PM]
10/15/2015	255	DEFERRED APPENDIX, volume 8 of 10, on behalf of Appellant American Express Company and American Express Travel Related Services Company, Inc., FILED. Service date 10/15/2015 by CM/ECF. [1620586] [15-1672] [Entered: 10/15/2015 09:38 PM]
10/15/2015	256	DEFERRED APPENDIX, volume 9 of 10, on behalf of Appellant American Express Company and American Express Travel Related Services Company, Inc., FILED. Service date 10/15/2015 by CM/ECF. [1620587] [15-1672] [Entered: 10/15/2015 09:40 PM]
10/15/2015	257	DEFERRED APPENDIX, volume 10 of 10, on behalf of Appellant American Express Company and American Express Travel Related Services Company, Inc., FILED. Service date 10/15/2015 by CM/ECF. [1620588] [15-1672] [Entered: 10/15/2015 09:43 PM]
10/15/2015	274	SEALED DEFFERRED APPENDIX, Volume 1 of 10, on behalf of Appellant American Express Company and American Express Travel Related Services

		Company, Inc., FILED. [1626306] [15-1672] [Entered: 10/23/2015 10:27 AM]
10/15/2015	275	SEALED DEFFERRED APPENDIX, Volume 2 of 10, on behalf of Appellant American Express Company and American Express Travel Related Services Company, FILED. [1626452] [15-1672] [Entered: 10/23/2015 11:35 AM]
10/15/2015	280	SEALED DEFFERRED APPENDIX, Volume 3 of 10, on behalf of Appellant American Express Company and American Express Travel Related Services Company, FILED. [1626461] [15-1672] [Entered: 10/23/2015 11:39 AM]
10/15/2015	276	SEALED DEFFERRED APPENDIX, Volume 4 of 10, on behalf of Appellant American Express Company and American Express Travel Related Services Company, FILED. [1626453] [15-1672] [Entered: 10/23/2015 11:36 AM]
10/15/2015	277	SEALED DEFFERRED APPENDIX, Volume 5 of 10, on behalf of Appellant American Express Company and American Express Travel Related Services Company, FILED. [1626454] [15-

		1672] [Entered: 10/23/2015 11:37 AM]
10/15/2015	285	SEALED DEFFERRED APPENDIX, Volume 6 of 10, on behalf of Appellant American Express Company and American Express Travel Related Services Company, FILED. [1626474] [15-1672] [Entered: 10/23/2015 11:43 AM]
10/15/2015	281	SEALED DEFFERRED APPENDIX, Volume 7 of 10, on behalf of Appellant American Express Company and American Express Travel Related Services Company, FILED. [1626462] [15-1672] [Entered: 10/23/2015 11:40 AM]
10/15/2015	282	SEALED DEFFERRED APPENDIX, Volume 8 of 10, on behalf of Appellant American Express Company and American Express Travel Related Services Company, FILED. [1626463] [15-1672] [Entered: 10/23/2015 11:40 AM]
10/15/2015	283	SEALED DEFFERRED APPENDIX, Volume 9 of 10, on behalf of Appellant American Express Company and American Express Travel Related Services Company, FILED. [1626465] [15-1672] [Entered: 10/23/2015 11:41

		AM]
10/15/2015	284	SEALED DEFFERRED APPENDIX, Volume 10 of 10, on behalf of Appellant American Express Company and American Express Travel Related Services Company, FILED. [1626467] [15-1672] [Entered: 10/23/2015 11:41 AM]
10/19/2015	262	FRAP 28(j) LETTER, dated 10/16/2015, on behalf of Appellee United States of America, RECEIVED. Service date 10/16/2015 by CM/ECF. [1622359] [15-1672] [Entered: 10/19/2015 01:50 PM]
10/19/2015	265	FRAP 28(j) LETTER, dated 10/19/2015, on behalf of Appellant American Express Company and American Express Travel Related Services Company, Inc., RECEIVED. Service date 10/19/2015 by CM/ECF. [1622900] [15-1672] [Entered: 10/19/2015 08:34 PM]
10/21/2015	267	FINAL FORM BRIEF, on behalf of Appellee United States of America, FILED. Service date 10/21/2015 by CM/ECF. [1624584] [15-1672] [Entered: 10/21/2015 02:35 PM]
10/21/2015	271	SEALED FINAL FORM BRIEF,

		on behalf of Appellee United States of America, FILED. [1626270] [15-1672] [Entered: 10/23/2015 10:12 AM]
10/21/2015	278	SEALED DEFERRED APPENDIX, Volume 4 of 10, on behalf of Appellee United States of America, FILED. [1626457] [15-1672] [Entered: 10/23/2015 11:38 AM]
10/23/2015	288	FINAL FORM BRIEF, on behalf of Appellant American Express Company and American Express Travel Related Services Company, Inc. FILED. Service date 10/23/2015 by CM/ECF. [1626566] [15-1672] [Entered: 10/23/2015 12:32 PM]
10/23/2015	289	FINAL FORM REPLY BRIEF, on behalf of Appellant American Express Company and American Express Travel Related Services Company, Inc., FILED. Service date 10/23/2015 by CM/ECF. [1626576] [15-1672] [Entered: 10/23/2015 12:38 PM]
10/23/2015	292	SEALED FINAL FORM BRIEF, on behalf of Appellant American Express Company and American Express Travel Related Services Company, Inc., FILED. [1627451] [15-1672] [Entered: 10/26/2015 10:52 AM]

12/17/2015	331	CASE, before RKW, RCW, CFD, C.JJ., HEARD. [1666559] [15-1672] [Entered: 12/17/2015 12:03 PM]
12/18/2015	332	ORDER, dated 12/18/2016, pending decision in United States v. Am. Express Co., No. 15-1672, the Court on its own motion hereby orders a temporary stay of the Order of the United States District Court for the Eastern District of New York dated 04/30/2015. The Court further orders a temporary stay in the District Court of any and all matters related to this litigation, by: RKW, RCW, CFD, C.JJ., FILED. [1667760] [15-1672] [Entered: 12/18/2015 01:43 PM]
12/18/2015	334	CERTIFIED ORDER, dated 12/18/2015, to EDNY, ISSUED. [1667775] [15-1672] [Entered: 12/18/2015 02:02 PM]
01/14/2016	355	FRAP 28(j) LETTER, dated 01/14/2016, on behalf of Appellee United States of America, RECEIVED. Service date 01/14/2016 by CM/ECF. [1683949] [15-1672] [Entered: 01/14/2016 10:06 AM]
01/15/2016	358	FRAP 28(j) LETTER, dated 01/15/2016, on behalf of Appellant American Express Company and

		American Express Travel Related Services Company, Inc., RECEIVED. Service date 01/15/2016 by CM/ECF. [1685725] [15-1672] [Entered: 01/15/2016 05:01 PM]
09/26/2016	377	OPINION, the district court judgment is reversed and remanded with instructions to enter judgment in favor of Amex, by RKW, RCW, CFD, FILED. [1870813] [15-1672] [Entered: 09/26/2016 02:43 PM]
09/26/2016	380	CERTIFIED OPINION, dated 09/26/2016, to EDNY (BROOKLYN), ISSUED. [1870837] [15-1672] [Entered: 09/26/2016 02:56 PM]
09/26/2016	383	JUDGMENT, FILED. [1871013] [15-1672] [Entered: 09/26/2016 04:01 PM]
11/10/2016	384	PETITION FOR REHEARING/REHEARING EN BANC, on behalf of Appellee United States of America, FILED. Service date 11/10/2016 by CM/ECF. [1904787] [15-1672] [Entered: 11/10/2016 01:51 PM]
11/16/2016	421	AMICUS BRIEF, on behalf The Retail Litigation Center, Inc. and the National Retail Federation, FILED. Service date 11/14/2016

by CM/ECF. [1908622] [15-1672] [Entered: 11/16/2016 04:25 PM]

11/16/2016	422	AMICUS BRIEF, on behalf of Amicus Curiae Ahold U.S.A., Inc., Albertsons LLC, H.E. Butt Grocery Co., HyVee, Inc., Safeway Inc., The Great Atlantic & Pacific Tea Company, Inc., The Kroger Co. and Walgreen Co., FILED. Service date 11/16/2016 by CM/ECF. [1908708] [15-1672] [Entered: 11/16/2016 04:56 PM]
11/21/2016	449	AMICUS BRIEF, on behalf of Amicus Curiae Discover Financial Services, FILED. Service date 11/21/2016 by CM/ECF. [1911496] [15-1672] [Entered: 11/21/2016 02:20 PM]
11/21/2016	451	AMICUS BRIEF, Consumer Action and U.S. Public Interest Research Group, FILED. Service date 11/21/2016 by CM/ECF. [1911567] [15-1672] [Entered: 11/21/2016 03:09 PM]
11/21/2016	453	AMICUS BRIEF, on behalf of Amicus Curiae Southwest Airlines Co., FILED. Service date 11/21/2016 by CM/ECF. [1911730] [15-1672] [Entered: 11/21/2016 04:32 PM]
11/22/2016	454	AMICUS BRIEF, on behalf of Amicus Curiae John M. Connor,

		Martin Gaynor, Daniel McFadden, Roger Noll, Jeffrey Perloff, Joseph A. Stiglitz, Lawrence J. White and Ralph Winter, FILED. Service date 11/22/2016 by CM/ECF. [1912149] [15-1672] [Entered: 11/22/2016 11:43 AM]
11/22/2016	455	AMICUS BRIEF, on behalf of Amicus Curiae AutoNation, Inc., Bally Total Fitness Corporation, Big Sur Waterbeds, Inc., BJ's Restaurants, Inc., Bridgestone Americas Inc., Brookstone Company, Incorporated, Caleres, Inc., Centric Group, LLC, CoreLogic, Inc., Crestline Hotels & Resorts, LLC, Darden Restaurants, Inc., Denver Mattress Hospitality, Ferguson Enterprises, Inc., Festival Fun Parks, LLC, Fitness International, LLC, Fresh Enterprises, LLC, Host Hotels & Resorts, Inc., Ingram Micro, Inc., Innovative Dining Group, LLC, Jack in the Box, Inc., Lucky Brand LLC, Luxottica Retail North America Inc., Marriott International, Inc., MorphoTrust USA, LLC, Nespresso USA, Inc., Nestle Waters North America Inc., Office Depot, Incorporated, OfficeMax Incorporated, Public

		Storage, Regents of the University of California, Sears Holdings Management Corporation, Sofa Mart, LLC, Staples, Inc., Target Corporation, Tesoro Companies, Inc., The New York Times Company, Tiffany and Company, WP Company LLC and Movant United Airlines, Inc., FILED. Service date 11/22/2016 by CM/ECF. [1912459] [15-1672] [Entered: 11/22/2016 02:08 PM]
11/29/2016	458	AMICUS BRIEF, behalf of Amicus Curiae Darren Bush, Stephen Calkins, Michael A. Carrier, Peter Carstensen, Andrew Chin, Joshua P. Davis, Einer R. Elhauge, Robin Feldman, Harry First, Esq., Eleanor M. Fox, Shubha Ghosh, Thomas L. Greaney, Thomas Grimes, Gregory T. Gundlach, Norman W. Hawker, Thomas J. Horton, Herbert Hovenkamp, John B. Kirkwood, Robert H. Lande, Marina Lao, Mark R. Patterson, Chris Sagers and Spencer Weber Waller, FILED. Service date 11/29/2016 by CM/ECF. [1915647] [15-1672] [Entered: 11/29/2016 01:41 PM]
01/05/2017	462	ORDER, petition for rehearing en banc denied, FILED. [1941027] [15-1672] [Entered: 01/05/2017

04:01 PM]

01/12/2017	463	JUDGMENT MANDATE, ISSUED. [1946683] [15-1672] [Entered: 01/12/2017 04:00 PM]
03/24/2017	464	U.S. SUPREME COURT NOTICE, granting Appellee State of Arizona, State of Connecticut, State of Idaho, State of Illinois, State of Iowa, State of Maryland, State of Michigan, State of Missouri, State of Montana, State of Nebraska, State of New Hampshire, State of Ohio, State of Rhode Island, State of Tennessee, State of Texas, State of Utah, State of Vermont and United States of America extension to file Writ of Certiorari, FILED. [2002092] [15-1672] [Entered: 03/31/2017 02:56 PM]
04/25/2017	468	U.S. SUPREME COURT NOTICE, granting Appellee United States of America a further extension to file Writ of Certiorari, to an including 06/02/2017, FILED. [2024205] [15-1672] [Entered: 05/02/2017 11:07 AM]
04/28/2017	467	U.S. SUPREME COURT NOTICE, granting Appellee Iowa, et al., a further extension to file Writ of Certiorari, to and

		including 06/02/2017, FILED. [2024170] [15-1672] [Entered: 05/02/2017 10:54 AM]
10/17/2017	470	U.S. SUPREME COURT NOTICE, dated 10/16/2017, U.S. Supreme Court docket # 16-1454, stating the petition for writ of certiorari is granted, RECEIVED. [2148730] [15-1672] [Entered: 10/17/2017 09:09 AM]

American Express
Merchant Regulations – U.S.

April 2012

* * *

3.2 treatment of the American Express Brand

For the past 150 years, American Express has built a brand that is synonymous with trust, integrity, security, quality, and customer service. We work diligently to uphold our reputation, and restrict Merchants from engaging in activities that would harm our business or brand.

Except as expressly permitted by Applicable Law, you must not:

- indicate or imply that you prefer, directly or indirectly, any Other Payment Products over our Card,
- try to dissuade Cardmembers from using the Card,
- criticize or mischaracterize the Card or any of our services or programs,
- try to persuade or prompt Cardmembers to use any Other Payment Products or any other method of payment (e.g., payment by check),
- impose any restrictions, conditions, disadvantages or fees when the Card is accepted that are not imposed equally on all Other Payment Products, except for electronic funds transfer, or cash and check,
- engage in activities that harm our business or the American Express Brand (or both), or

- promote any Other Payment Products (except your own private label card that you issue for use solely at your Establishments) more actively than you promote our Card.

You may offer discounts or in-kind incentives from your regular prices for payments in cash, ACH funds transfer, check, debit card or credit/charge card, provided that (to the extent required by Applicable Law): (i) you clearly and conspicuously disclose the terms of the discount or in-kind incentive to your customers, (ii) the discount or in-kind incentive is offered to all of your prospective customers, and (iii) the discount or in-kind incentive does not differentiate on the basis of the issuer or, except as expressly permitted by applicable state statute, payment card network (e.g., Visa, MasterCard, Discover, JCB, American Express). The offering of discounts or in-kind incentives in compliance with the terms of this paragraph will not constitute a violation of the provisions set forth above in this section 3.2, "treatment of the American Express Brand".

* * *

Agreement for
American Express Card ® Acceptance

The Agreement is by and between **American Express Travel Related Services Company, Inc.,** a New York corporation, and **you, the Merchant**. By accepting the American Express ® Card; you agree to be bound by the Agreement.

General Provisions

* * *

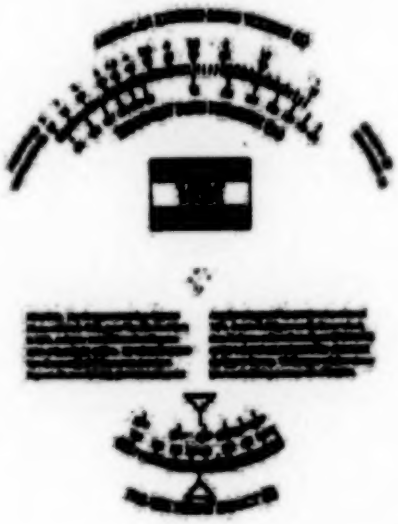
[1.]b. Other Parts of the Agreement.

i. Merchant Regulations. The Merchant Regulations set forth the policies and procedures governing your acceptance of the Card. You shall ensure that your personnel interacting with customers are fully familiar with the Merchant Regulations. The Merchant Regulations are a part of, and are hereby incorporated by reference into, the Agreement. You agree to be bound by and accept all provisions in the Merchant Regulations (as changed from time to time) as if fully set out herein and as a condition of your agreement to accept the Card. We reserve the right to make changes to the Merchant Regulations in scheduled changes and at any time in unscheduled changes as set forth in section 8.j of the General Provisions. The Merchant Regulations and releases of scheduled changes therein are provided only in electronic form, existing at the website specified below in the definition of "Merchant Regulations" or its successor website. However, we shall provide you a paper copy of or a CD-ROM containing the Merchant Regulations or releases of scheduled changes therein upon your request. To

order a copy, please call our Merchant Services representatives (telephone: 1-800-528-5200). We may charge you a fee for each copy that you request.

* * *

VISA PROFIT IMPROVEMENT CALCULATOR



If your business accepts American Express cards for payment, chances are you are paying them a substantially higher discount than for Visa and other means of payment. This calculator will show you how you may be able to cut that cost and significantly improve your profits. It's as easy as 1, 2, 3.

Important: Before taking any of the following actions, review your current American Express contract to ensure that these recommendations do not violate that contract.

Step 1:

Calculate your profit improvement potential.

- Subtract your Visa discount rate from your American Express discount rate. The difference is your American Express Discount Rate Premium.
- Determine your annual sales volume done with American Express cards.
- Find your American Express Discount Rate Premium on the inner wheel; then locate your annual American Express sales volume on the outer rim. Rotate the outer wheel until the two figures line up.

The window at the bottom of the wheel will show you the additional annual pre-tax profit you can realize by converting American Express transactions to Visa. If you want to improve your profits by an amount up to this level, read on.

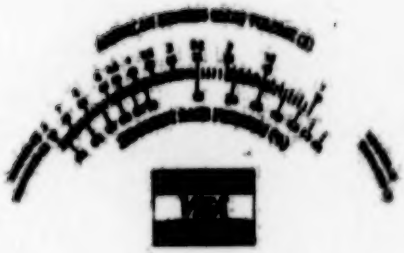
Step 2:

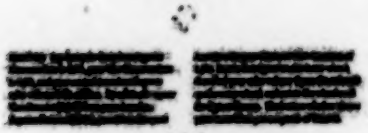
Improve your profits by shifting sales volume from American Express to Visa.

You can capture the profit potential from the chart with the wheel. Line up your American Express Discount Rate Premium on the inner wheel with the amount of sales volume you want to shift to Visa. The profit growth will be shown in the window.

Tips for shifting business for higher profits

- Don't let point-of-sale signage influence your customers to select your most costly payment option. Remove all American Express signage now visible to your customers at your point of sale. Install signage which favors your most profitable payment options. For example, Visa decals are available from your Visa representative.
- Train your sales people to ask for a more profitable payment option. A simple suggestion such as "Would you like to put this on your Visa?" is an inoffensive, yet effective way to encourage customers towards a more profitable payment choice.





Step 3:

Improve your profits by negotiating a lower discount rate from American Express.

■ Again, use the wheel to calculate the profit improvement potential from this effort. First, determine the discount rate reduction you were negotiated. Find this rate in the inner wheel, then line it up with your annual American Express sales volume. The window will show how much your profits can improve through successful negotiation.

Tips for negotiating a more profitable American Express discount:

■ If you participate in the American Express co-operationing program, you are probably paying about a 0.15% discount for the "privilege." This is your money being used to encourage your customers to select your least profitable payment option.

If you would rather spend this money for more profitable purposes, tell American Express that you no longer wish to participate in the program, and demand a reduction of 0.15% in your discount rate.

■ Consider a test to determine if American Express acceptance is profitable or unprofitable for you.

If you have more than one outlet, you might manage to compare the difference in sales between outlets that accept American Express and outlets which do not. If you have only one outlet, you might consider temporarily halting your acceptance of American Express and then carefully monitoring whether you really lose any customers. (Keep in mind that over four million merchant locations around the world accept Visa, but not American Express.)

Hint: You may also find that telling American Express about your plans for this test will help your negotiations.

To negotiate a fair discount with American Express, you need to know the true value of your various payment options. You'll find some interesting comparisons about the value that Visa brings you versus American Express on the next page.

HIGHLY CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER AMEXNDR16479545

Facts you can use when negotiating discount rates.

Visa can bring your business for more incremental sales:

- Visa has five times more cards in circulation than American Express, including five million more Gold cards.
- Visa has more cardholders at every income level, including upper-income households. In fact, Visa is found in twice as many households with incomes over $50,000 as American Express.
- Visa credit cards increase your customers' buying power by extending credit. In contrast, most American Express cards require full payment each month for their cardholders' charges.
- Approximately two-thirds of American Express cardholders carry a Visa card. Less than one-fifth of Visa cardholders have an American Express card.

Visa accelerates your cash flow:

- You receive payment for your Visa sales drafts almost immediately – usually within 48 hours, if not faster. American Express is probably paying you much more slowly, or charging you an even higher discount for prompt settlement.

For information about point-of-sale signage and other support available from Visa, call your Visa representative.

Ich Everywhere You Want To Be.

© Visa U.S.A. Inc. [illegible]

AMERICAN EXPRESS
COMPETITIVE STRATEGY

Presentation by
BRADFORD W. MORGAN

BOARD OF DIRECTORS MEETING
VISA U.S.A.

Cannes, France
June 5, 1989

AMERICAN EXPRESS COMPETITIVE STRATEGY

Slide #

The History of our industry shows banks being far more concerned with competing against other banks than with competing against American Express. We think that's changing and we want today to be part of that change.

(#1) Today we'll give a brief overview of American Express. We will review new American Express initiatives which threaten the bank card industry. And we will lay out a strategy for attacking Amex vulnerabilities and exploiting Visa opportunities.

While banks have historically thought of American Express as a somewhat indirect competitor who specialized in a niche of charge card T&E usage among upscale consumers, the truth is that Amex has grown to be the most formidable competitor the bank card industry has today.

(#2) In the past four years American Express revenues have grown from $9.6 billion to $22.9 billion -- a 21 percent annual growth rate.

(#3) And this growth has turned American Express into a powerful financial engine -- with net profits growing from $0.6 billion in 1984 to $1.04 billion in 1988.

(#4) The heart of this financial engine is the travel-related services division, which accounts for 69 percent of total American Express net profits and, within travel-related services, the card business is the crown jewel, representing 60 percent of travel-related services' net profits.

(#5) Despite all of this, Visa has managed to outgrow American Express. Over the past ten years we've averaged 17 percent growth to a $210 billion level while American Express has grown 16 percent to $89 billion.

This outstanding Visa growth has led to a certain feeling of complacency -- a feeling that we can win the long-term race to become the leading payment system by simply continuing business as usual. Well, if history could be used to predict the future, I (#6) guess we could win this race. But, unfortunately, we can't rely on Visa's past success to predict success in the future. That's because our future is threatened by a series of new initiatives recently launched by American Express.

(#7) Here's a quote from the 1988 American Express annual report. You'll note that their former president refers to 1988 as "a period in which new strategic initiatives were launched that will pave the way for continued growth in the years to come."

(#8) Well, here's what those new initiatives are: In summary, American Express is broadening their base, both their cardholder and their merchant base. They are launching new products, not only Optima which is the most direct threat to the bank card industry, but as you'll see later, a whole series of new products which threaten the overall banking industry. American Express is investing in superior new technology that will help them improve their service to both the consumer and the merchant. And, finally, American Express is making a strong attempt to wrest control of the merchant relationship away from bank cards.

Let's look at all of these in more detail. First, American Express' effort to broaden their cardholder base.

(#9) Here are some quotes relating to this effort. As you can see in the quote from Mr. Cooperman, President of American Express' Consumer Card Group, American Express is pursuing a strategy which sees them expanding into new segments. While American Express' target consumer could once be described as "the travelling business executive," their new targets cover a much broader base including retired people, students, working women, etc. And credit card management reports that this effort is being successful to the extent that American Express is expanding its card base at a faster rate now than it did during all of the last 15 years.

(#10) This next slide puts that in perspective. If we can look at the past two years you'll see that American Express' cardholder base in the U.S. has been growing at 14 percent compared to an 8 percent growth rate for Visa cardholders.

And just who are these new American Express cardholders? Well, they look a lot like the holders of your MasterCards and your Visas. The (#11) next slide puts that in perspective. It compares the average household income of American Express cardholders versus Visa cardholders expressed in constant 1989 dollars. As you can see, in 1982 there was a $9,000 difference in the average incomes. As of 1987, the latest year for which we have data, this gap had been cut in half.

As we understand it, American Express is now routinely approving applications for consumers

with average annual incomes of $15,000 or less. If you think that American Express' initiatives threaten only a small part of your cardholder base, you're dead wrong.

(#12) American Express is also broadening their merchant base into merchant segments which represent your bread and butter. The days when Amex targeted only carriage trade merchants are long gone. As you can see here, the American Express Vice President of Marketing for their Establishment Services Division, states that Amex's position is that "wherever the card member wants to use the card, Amex wants to be there, so long as it's legal." That means that American Express is expanding into new merchant categories. New merchant categories which look a lot like our targets -- fast food, gas stations, movie theatres, etc. Amex no longer has any concern about whether the merchant fits their prestige image or not. As you can see, they're already accepted in Mervyn's, Ace Hard-Ware, True Value Hardware, and we understand that negotiations are under way with K Mart, Walmart, and Target.

To give you an idea of how much of their resources Amex is willing to put behind this merchant expansion effort, here's a look at their (#13) organization chart.

As you can see, Amex has a separate marketing group for service establishments, which has teams working in categories like lodging, transportation, restaurants, and retail. They also have a segment of this Special Service Establishments Group which focuses primarily on expansion industries. Each one of these targeted expansion industries

has a separate management group assigned to it, headed up by three vice presidents per expansion industry. Expansion industries include health care, sports, insurance, fast food and entertainment.

And the American Express marketing work being done at headquarters is executed in the field by an excellent sales force working out of six regional offices with over 500 sales reps who are doing merchant support and point-of-sale material.

I should point out here that, while 500 sales reps may not seem like a lot compared to the total field sales forces yielded by the banking industry, we should keep in in mind that these are two different types of organizations. The sales forces fielded by the banking industry are out there selling the services and pricing of one bank versus another. They rarely, if ever, make any attempt to present the merchant community with comparisons of the value of bank cards versus American Express. In contrast, the American Express organization is monolithic. Their sales force is out there every day selling the benefits of American Express versus the bank cards.

And these presentations are being given to your bread and butter, the retail industry. Let me make the point once again: American Express can no longer be thought of as an upscale T&E card. Here's (#14) a quote from Phillip Riese, their Executive Vice President and General Manager of the Service Establishments Division. Mr. Riese says, "We look like a T&E card, we smell like a T&E card, but our biggest industry today is retail.

That is currently our largest growing single industry."

The American Express drive into the retail business which represents (#15) your bread and butter is being successful. As you can see here, they are now accepted in 84 of the top 100 department stores (#16) compared to 82 for Visa. And here's a chart which shows the growth they are achieving in retail. As you can see, retail accounts now represent $17.6 billion for American Express, 20 percent of their total. This compares to only $4.4 billion and 13 percent of their total in 1982.

(#17) Now let's move on to one of the other new American Express strategic initiatives which threatens the banking industry, their work with new products.

The new American Express product which most directly threatens the bank card industry is Optima. While American Express tried to lull the banking industry into inactivity with statements of some very modest program goals when Optima was introduced, American Express is (#18) now talking much more aggressively. Here are a couple of quotes. The general manager of their Optima Card Division says, "My goal is to put the Optima Card into the wallet of every American Express cardholder." And in a recent letter to the editor of a magazine, their vice president of industrial relations says, "We are experiencing significant high quality growth in our consumer lending business, all area of great strategic emphasis for us."

The new aggressive stance American Express is taking behind Optima (#19) should be a great concern to you. As you can see here, Optima Card holders are bank cardholders. Eighty percent of the people, who carry American Express Green Cards and the Gold Cards also carry a bank card. In the case of Optima, though, fully 95 percent of the current Optima cardholder base are current bank cardholders as well. (#20) And what happens when Optima Card gets in the wallet of one of your bank cardholders? Research shows that 75 percent of these people substitute the Optima Card for usage of their bank cards. Indeed, 20 percent of Optima cardholders say they're using it as a total replacement for their bank card.

Think of the impact this is having on your outstandings. To put that (#21) in perspective, here's a conservative projection of the outstandings American Express can expect on their Optima Card. As of the end of 1988, Optima was up to $3 billion in reported outstandings on their Optima Cards. Looking forward, we know that American Express has said that they have a short-term goal of having Optima Cards in the wallets of 40 percent of the current American Express cardholder base by 1982. If these new Optima cardholders carry the same outstandings level per account that we are currently seeing on Optima cards, Optima should be up to $23.2 billion in outstandings by 1992. We think that's a conservative estimate.

(#22) If we assume that 48 percent of Optima outstandings are cannibalized from bank cards (this being based on the consumer research we've

done thus far) and if we assume a 4 percent pre-tax income level from outstandings to the bank, then this next chart quantifies the effect of Optima's growth on your bankcard income. As you can see, if Optima does hit $23 billion in outstandings by 1992, this will reduce 1992 bankcard income by $442 million.

(#23) But Optima is not the only product that American Express is pursuing to take income away from the banking industry. One of the points this slide makes for me is to demonstrate the need to broaden awareness of the American Express threat beyond the boundaries of just the card part of the banking industry. Amex is taking the profits they are generating from their card and travelers cheque businesses to fund attacks on the overall banking industry with new products in money markets, saving certificates, CDs, home mortgages, etc.

(#24) Moving on to the next area of new strategic initiatives from Amex. We have their investment in superior new technology.

(#25) The most important development in this area is Project Genesis. Genesis is a rebuild of the total Travel Related Services computer system worldwide to integrate them into a single system incorporating all products and all regions. It allows Amex to combine and manipulate their massive data base of information about their consumers and their merchants. When Project Genesis was first announced, they indicated that it would be a $250 million investment over five years. More recently we've seen estimates coming out of American Express that this project could

involve as much as a $500 million investment in new technology.

(#26) Here are a couple of quotes about Project Genesis. Amex's Vice President of Operations and Services says, "It's not a systems project but more of a business vision." Another American Express executive sums it up as, "We are betting the ranch on the Genesis Project."

At first glance you might think that referring to a $250 to $500 million investment as "betting the ranch" represents hyperbole. But we don't think this Amex executive was referring to the size of the investment. We think he was referring to the strategic importance which Amex places against this project. As you'll see later in this presentation, a key to American Express' long-term prosperity is their ability to command a premium discount from the merchant community. Visa's product and service quality have improved so much relative to American Express that we are now at a point where we can truly threaten their ability to command premium pricing from the merchant community. We think American Express is looking forward and seeing this threat. We believe they are looking at Project Genesis as being an area where they can gain enough of an advantage versus the bank card industry to continue justification of their premium pricing to merchants. American Express is betting the ranch that they can develop something as a monolithic organization that the bank card industry will not be able to match due to its fragmented structure.

(#27) Let's look at a bit more detail about what Project Genesis can do for American Express. This

next chart organizes some of the key benefits of Project Genesis according to where the benefit will be derived. As you can see, American Express will benefit in the form of reduced operating costs. We've heard estimates that they will lower their billing cost by 25 percent and they'll clearly reduce their float expense, reduce their fraud losses, and gain much cheaper data manipulation capabilities.

Project Genesis will also have some benefits for the consumer by enhancing American Express' ability to provide such services as personalized interaction, a cross-reference of all Amex relationships, spending limits that are tailored not just to the individual but also perhaps to the time of the year, and a whole array of valet services.

However, we believe the greatest benefits of Genesis will be those delivered to the merchant community. Genesis will permit Amex to provide the merchant with highly customized reports and mailing lists. If you'd like a bit of perspective on this, imagine that you are a car dealership trying to decide which payment transaction card you want to accept in your service department and which supplier you want to do your card processing. The first salesman in the door represents the banking industry and he tells you about the price of his processing service compared to the bank down the street. The next salesman through the door represents American Express and he promises you a mailing list of all consumers within a twelve mile radius of your dealership who have spent more than $200 on automobile repairs in the past year or who have shown a sudden increase in their monthly

spending patterns indicative of having received a salary increase. Which of these companies will you want to do business with and will you be willing to pay a premium discount to American Express?

Other benefits to the merchant from Project Genesis include improved chargeback handling and documentation, reduced fraud losses, and the potential for faster authorization and settlement.

We believe the bank card industry needs to recognize right now the threat the Project Genesis represents to their long-term market share. We believe the bank card industry needs to take action to counteract this threat immediately. It is Visa's intention to take the lead in this process.

(#28) The final area of new strategic initiatives from American Express concerns their attempt to gain control of the merchant relationship. (#29) This next slide is a simplified reminder that the processor truly controls the merchant relationship. It is the processor who controls the service to the merchant, authorization time, transaction pricing, access to information, and the ability to change product requirements and capabilities -- particularly as new products and services are introduced. If that processing is being done by a Visa member or by a neutral third party, our members can fare okay. When American Express controls that relationship, we're in danger. There is very little value from being one of the owners of the railroad if a competitor is in full control of all the railroad stations.

(#30) And here's what American Express is doing to get control of those stations. They've been

employing various anti-competitive pricing strategies, bundling transaction fees with merchant discounts to gain major pricing advantages versus Visa members, and employing pricing incentives for merchants to purchase American Express terminals. We're seeing American Express discriminate between their merchants and bank card merchants. This takes the form of requiring non-Amex merchants to provide incremental E.D.C. (that is, electronic data capture) data. We've seen what we believe to be artificial installation delays for non-Amex terminals and Amex EDC data requirements which favor the new terminal they are now selling.

We also currently have an inequitable clearing access situation. American Express has clearing links to Visa, but Visa is not linked to American Express. With few exceptions, member access to American Express is solely through third parties.

(#31) In summary, here's the threat from American Express' new initiatives:

American Express is broadening their base. Expanding out of their niche and into your bankcard area. Expanding to your cardholders and to your merchants.

American Express is fielding new products which will cut bankcard profits significantly. Optima alone has the potential to cut your bankcard profits by $0.5 billion per year by 1992, to say nothing about the other new products like CDs and home mortgages which threaten the overall bank business.

Amex is investing in superior technology which will significantly enhance their card utility for their consumers and, very importantly, will supply merchants with value-added information and services which have the potential of justifying a continuation of Amex's premium discount to the merchant.

And finally, Amex is making an aggressive attempt to take control of the merchant relationship which is so vital to our future success in this business.

(#32) This next chart attempts to quantify the financial threat from the new American Express initiatives. It's not a pretty picture! We've shown two projections here, one conservative and one very realistic. The conservative estimate assumes that Optima expands to 40 percent of the American Express card holder base and that the other American Express initiatives result in a shift of two market share points from bank cards to American Express. Using these conservative estimates, we see the banks' annual pre-tax profit cut by $600 million by 1992. If we assume, however, that Optima expands to 78 percent of the Amex cardholder base (in effect to all non-corporate Amex cardholders) and that the other initiatives result in a shift of five market share points to American Express, you can see that American Express could easily be cutting pre-tax bankcard profits by $1.25 billion by 1992.

That's a major threat and we clearly need to take action to offset (#33) this threat. Visa is taking the lead with strategies and actions designed to defend your profits. Our strategies for this can be broken

down into two groups -- those designed to capitalize on American Express vulnerabilities and those designed to capitalize on Visa's opportunities.

(#34) Let's look first at American Express' vulnerabilities. There are two. First American Express is depending upon banks and the bank card industry and second, the American Express premium price success cycle is fragile. It will not withstand an attack by a determined competitor.

(#35) This next chart summarizes American Express' dependence on the banking industry. Any outside looking at our business would probably be amazed to see how kind the banking industry has been to this competitor.

Banks distribute American Express' products. The most notable of these is the American Express travelers cheque. Bank sales of American Express travelers cheques give American Express $45 million in profits each year. Just as importantly, the banking industry sale of American Express travelers cheques gives prestige and credibility to this product. Because they are widely available for purchase from banks, American Express travelers cheques have far more consumer credibility than they would if their sale was limited to travel agencies and retail stores.

And, when a bank sells an American Express travellers cheques in preference to a Visa or MasterCard cheques, they are reinforcing the brand name of their competitor while hurting the image of their own most profitable brands.

Banks have also financed American Express products -- most notably the American Express Gold Card. Even though American Express now has the ability to finance the gold card on their own, the latest data

[Next page missing in original exhibit]

and which listed by name every Visa and MasterCard board member whose bank sold an American Express travelers cheques in any of their branches, using this as evidence of the lack of banking industry support for Visa.

(#37) Here's another example. This is a quote from an American Express letter to bank branch managers which announces a sweepstakes promotion in which the bank branch manager would be rewarded for selling American Express Green Cards through the bank. What's notable about this letter is that it was sent to the bank branch without the knowledge of bank management. We can't help but wonder how many bank branch managers are out there right now selling your consumers American Express cards instead of bank cards without the knowledge of their bank's management.

(#38) We think the time has come for the banking industry to recognize this external threat and close its ranks. Visa will be looking for ways to help and encourage the banking industry to reduce its relationships with American Express and to charge Amex an appropriate price for any access to our industry's strategic assets.

We certainly won't strike Amex any fatal blows in this manner but we can make an important dent

in the prestige and the income which the banking industry is currently giving to American Express.

(#39) To put this in perspective, if we make a 10 percent reduction in the banking industry's use of FDR and sale of American Express travelers cheques, we will reduce American Express' net income by 1 percent. If the banking industry withdraws total support of American Express travelers cheques and FDR, they will reduce Amex net income by $85 million -- that's $85 million that American Express will not have to invest behind Optima, Project Genesis, or the very heavy advertising they're directing at your customers.

(#40) While that is an important step, Amex's most important vulnerability is a premium price success cycle that will not withstand attack from a determined and reasonably concerted bankcard industry.

(#41) Here's what we mean by a premium price success cycle. As you can see (looking at the top), American Express has real advantages versus bank cards. They have even more advantages which are only perceived -- that is, the consumer or the merchant thinks American Express takes these real and perceived advantages and uses them as the basis to charge merchants and consumers a substantial premium. They then take that premium and they invest it in advertising and in systems and services to reinforce and enhance their real and perceived advantages.

As you can see, this is a cycle. It feeds itself and very importantly, it is a different cycle than the bank card industry has been on. By and large, the bank card associations had been working to try to

become the low cost supplier to the banking industry. So while the bank card associations have been pursuing cost reductions, efficiencies, and lower pricing, American Express has been pursuing higher pricing to fund the creation and aggressive marketing of product and service advantages.

(#42) We can't continue business as usual. We need to attack this premium price success cycle and the way to attack it is by attacking their real and perceived advantages. If we can eliminate their advantages, or at least eliminate those advantages which are meaningful to consumers and merchants, we can pressure their merchant discount and thus weaken their financial engine and we can encourage consumer preference for Visa that helps to keep Amex as a niche product.

(#43) The key Amex vulnerability is their merchant discount. American Express is currently charging a discount of about 3.25 percent (#44) versus 1.75 percent for bank cards. And as you can see in this next chart, that discount represents 68 percent of American Express' card revenues while 30 percent of their revenues comes from their cardholder fee. The merchant discount, 68 percent of their card revenues, is what American Express is trying to protect with Project Genesis. The 68 percent merchant discount and 30 percent card member fee income is what Amex is trying to protect with their overall strategy of investing heavily in advertising.

(#45) Amex's merchant discount premium is indeed vulnerable, as shown in this next set of quotes form the merchant community. As you can

see in the first quote, American Express' premium discount is recognized by the financial people out there in the merchant community and they're sensitive to it. But as you can see in the next quote, top management, marketing management, and operations management frequently are not as aware of this discount or believe that it is justified. This quote refers to "Management Horizons Data." That's the name American Express uses for their presentations which attempt to convince the merchant community that Amex is worth their discount premium because they bring in a better class of consumer who would not be brought in by the bank card industry. The third quote shows that the American Express Management Horizons Data is by-and-large "hot air." This is quote from a merchant that dropped American Express and found that Amex hadn't really been bringing any incremental sales in the door. The final quote, from a vice president at Bloomingdale's, notes that their company has found that Visa can deliver just as good a cardholder as American Express.

(#46) There is fairly good merchant awareness that there are more Visa cards out there than American Express cards. However, they may not be aware of the numbers. As you can see here, there are 116 million Visa cardholders versus only 22 million American Express card holders -- and keep in mind that 80 percent of those people coming in the door with an American Express card also have a bank card in (#47) their wallet. The merchant community also has not been told well enough that American Express' image of superiority among upscale cardholders is a myth. If you look at households with annual incomes of $50,000 or

higher, for example, 71 percent of them are Visa cardholders compared to only 35 percent carrying an Amex card. We simply are not doing a good enough job of getting these kinds of messages out to the merchant community.

(#48) In contrast, Amex is doing a powerful job of selling themselves to merchants. They market themselves exceedingly well with an incremental sales story and aggressive negotiating. They provide value added services such as a co-op advertising, joint merchant promotions and marketing advice. They've got the ability to deliver messages and services to the merchant community with operations reps, marketing reps, promotion reps. And they are building a potentially unmatchable tool for delivering merchant utility, that being Project Genesis.

(#49) Visa must do a better job of countering these Amex moves. Here's what we see as the Visa imperatives.

First, we need to do a better job of telling the Visa story to merchants. This should be done through an effective trade advertising campaign and through direct communications. Part of those direct communications will come from the Merchant Relations Group which we are now organizing. These people will be developing industry-specific strategies and presentations for merchants. Another key part of the Merchant Relations Group's responsibilities, though, will be to help train and provide materials which will augment and empower the bank sales forces. We will take the lead in providing the bankcard industry sales forces with materials and training

which help them to better communicate the comparative value of using bankcards versus American Express. By doing that, we should help to put pressure on Amex's merchant discount. Merchants don't like paying Amex a premium discount, but they've been misled into believing it is necessary. Visa needs to arm merchants with the facts that they need to negotiate a more favorable discount.

The second area of imperatives concerns eliminating meaningful Amex advantages. Here again, we need to provide merchants with marketing assistance like co-op advertising and joint promotions and, very importantly, we need to improve our merchant service with work such as that done recently in the T&E business. We need to reduce unnecessary and unfair chargebacks, we need to increase our authorization speed and accuracy.

A third area of Visa imperatives is to maintain bank industry control of merchant processing. We need to eliminate Amex pricing advantages. This is an area where Visa recently took steps by eliminating Amex access to incentive rates. We need to develop a more competitive bank card EDC terminal for data capture and report production. And we need to negotiate equitable Visa clearing links to Amex.

Finally, we need to prevent Amex from building a superior service with their Project Genesis. We need to provide equivalent data to merchants in terms of demographics and store specific reports.

All this will pressure Amex's merchant discount and that's the key to (#50) winning this battle.

This next chart quantifies the effect of a reduced merchant discount on Amex's ability to fund anti-bankcard programs. If you look at the horizontal axis, you'll see Amex's current discount rate of about 3.25 percent and, off to the right, you'll see Visa's current average discount rate of about 1.75 percent. The vertical axis shows the pre-tax profit of Amex's Travel Related Services Group. As you can see, if American Express is forced to lower their discount rate by 50 basis point in order to compete more effectively with the bank card industry, this will cut their profits by almost 45 percent. And, if the improvements in our services to merchants and our communications of the comparative value of bankcards to merchants improves sufficiently that Amex needs to reduce their merchant discount by 120 basis points, Travel Related Services will be forced into a break-even financial operation.

I think this chart puts perspective on the quote I showed you earlier where an American Express executive indicated that they were "betting the ranch on Project Genesis."

(#51) American Express is also vulnerable on the premium fees they are charging their cardholders. The Amex Green Card costs $55 a year compared to an average of $18 for a Visa Classic. And, on a Gold Card basis, Amex costs $75 versus an average of $39 for Visa Gold. The comparisons favor Visa even more when you consider that Amex card holders have to pay an additional $15 for Optima in order to get the same benefits as convenience use of a Visa card would provide.

We have been and will continue to put pressure on this premium fee by (#52) communicating to consumers that Visa can deliver more of the basic functionality of a payment transaction card than American Express can. Consumers get a payment transaction card in order to use it with merchants. Visa is accepted by three times more merchants than American Express, worldwide and in the U.S.

(#53) But we do need to improve our service to consumers in many ways. Our authorization performance, while good in the absolute at 97 percent, is not as good as American Express' 99 percent authorization (#54) performance. American Express does a better job than the bank card industry does at taking potential erroneous declines and turning them into authorization approvals via a referral process. We've taken major steps to improve this comparison in the T&E business with the development of the Visa Travel Industry Services package, but much more needs to be done in other industries.

(#55) American Express has a wide range of perceived and real advantages over Visa as far as the consumer is concerned.

They have a strong image of quality and appropriateness and acceptance worldwide. It's ironic that even though Visa is accepted at over three times more merchants worldwide, most American consumers feel that they will see wider acceptance of American Express once they cross our national borders. We must keep hammering home our message that Visa is more widely accepted than American Express.

Amex has a bias to authorize at point-of-sale with no pre-set spending limits and a relatively low level of declines.

American Express has a very high quality of customer service. Customer inquiries are handled in a highly professional manner and they have offered good quality service in such areas as emergency card replacement.

Finally, Amex provides a high level of detailed transaction information to the consumer with country club billing and annual summaries.

Visa needs to respond to any American Express advantages which are truly meaningful to the consumer. We need to compete more (#56) effectively. Here are our imperatives:

We clearly need to tell consumers the Visa story. We need to tell it better than we have told it up until now. We need to significantly increase our advertising and our other efforts to educate the consumer regarding the advantages of using Visa -- advantages such as Visa's superior merchant acceptance in the U.S. and worldwide. We need to reinforce the consumer's sense of the appropriateness of using Visa in many types of merchants. And we need advertising which clearly communicates the features and benefits of Visa products in the absolute and in comparison to American Express.

We need to eliminate all meaningful Amex advantages.

Here again, this involves strengthening the Visa image and its sense of consumer appropriateness through image advertising, situational

advertising, and distribution of our point-of-sale material.

We need to improve Visa authorization procedures with further improvements in the T&E area, and with improvements like the ones we made in T&E through the merchant base. Visa needs to develop and enforce issuer performance standards. And we need to encourage frequent credit limit reappraisals to be sure that excessively conservative limits are not forcing our consumers to become Amex cardholders.

Key: We need to enhance our customer service! We've taken a good first step on this with the quality assurance function and the new "Commitment to Quality" program. We need to go even further in this regard. We need to improve our communications with the consumer. When a customer has any contact with the Visa organization, whether that be with Visa management or with any of the Visa member banks, that inquiry has to be handled promptly and professionally and to the consumer's satisfaction.

Last, we need to do work to provide detailed transaction information to the consumer in a form that gives the consumer value.

The net of all this will be to increase consumer preference for using Visa. And, as we do that, we can expect a very favorable effect on the profitability of Visa member banks. The effect of shifting (#57) consumer preference and Visa's advantage is shown in this next chart. As you can see, every share point that is shifted in the market to the bankcards' advantage -- to the advantage of

Visa and MasterCard -- shifts almost $80 million in pre-tax profit away from American Express and to the bankcard industry. Five share points, not an ambitious goal for Visa, is worth almost $400 million in increased bankcard profitability.

(#58) In summary, I hope this presentation has helped to demonstrate that American Express is an enormous threat. As we showed, American Express has an easy potential to cost the bank card industry $1.25 billion in lost profits by 1992 and that is a conservative estimate of the American Express threat.

But American Express has two main vulnerabilities: They're dependent on the banking industry to continue to give them favorable treatment as we have in the past. This clearly is an issue which the bank card industry needs to address. Secondly, American Express' premium price success cycle is vulnerable. It will not withstand a reasonably concerted attack from a determined competitor.

The bank card industry can, and must, increase the value of their product to the customer -- to the consumer and to the merchant -- and must communicate their superior value better. When this is done, American Express will no longer be able to justify the high prices they are currently enjoying and, as a result, will no longer have excess profits available to fund programs which attack the banking industry. We can do this by identifying and eliminating all meaningful differences between American Express and our bank card product and by communicating our story better to merchants and consumers. Doing that

will weaken American Express' ability to compete and will increase Visa's market share.

Visa will take the lead in this effort. We have already identified important actions which Visa can take in the coming year and in the years ahead to compete more effectively versus American Express. These actions will be built into the budget proposals and marketing plans for 1990 and the years ahead.

Harking back to the slides which I used to open up this presentation, we cannot look back at history and use it to predict the future. We cannot expect to beat American Express in the race to become the world's leading payment transaction system by simply conducting business as usual. The new strategic initiatives from American Express cannot be overlooked. Action to respond to these threats, to defend and grow our business, cannot be delayed. The time has come for the banking industry to recognize American Express as a determined and formidable competitor and to respond with appropriate actions.

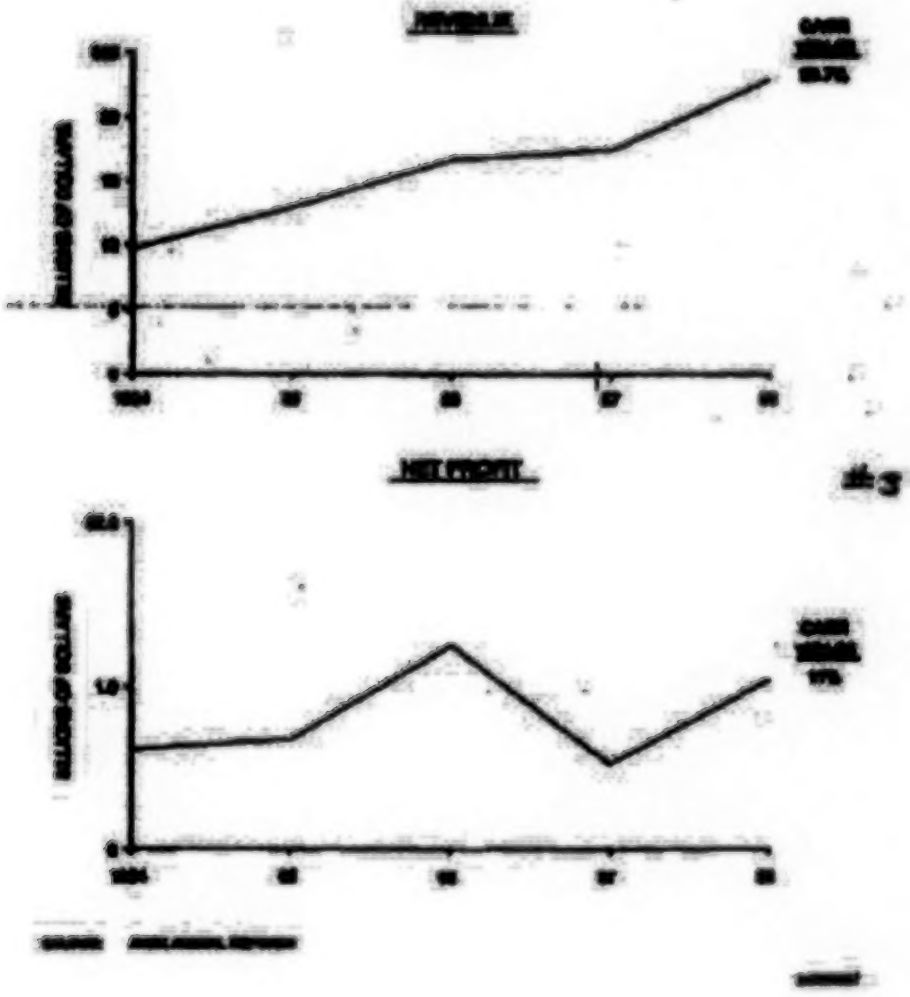
AMEX COMPETITIVE STRATEGY

AGENDA

- Amex Overview
- Amex new initiatives and threats
- Visa strategy
    - Amex vulnerabilities
    - Visa opportunities

AMEX COMPETITIVE STRATEGY

AMEX OVERVIEW
FINANCIAL PERFORMANCE

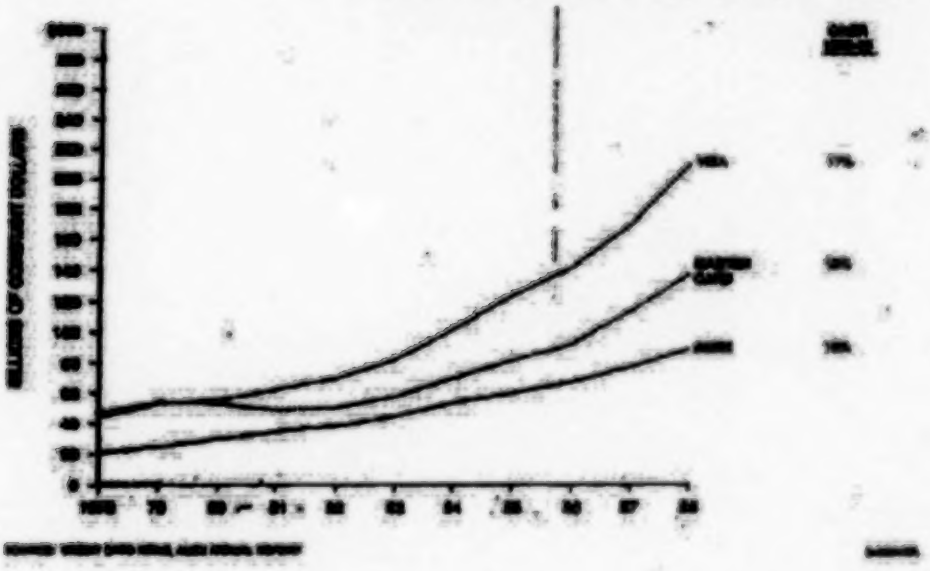


AMEX COMPETITIVE STRATEGY

AMEX OVERVIEW
NET PROFIT

AMEX COMPETITIVE STRATEGY

WORLDWIDE CHARGE VOLUME
RELATIVE PERFORMANCE



AMEX COMPETITIVE STRATEGY

AGENDA

- Amex Overview
- **Amex new initiatives and threats**
- Visa strategy
  - Amex vulnerabilities
  - Visa opportunities

AMEX COMPETITIVE STRATEGY

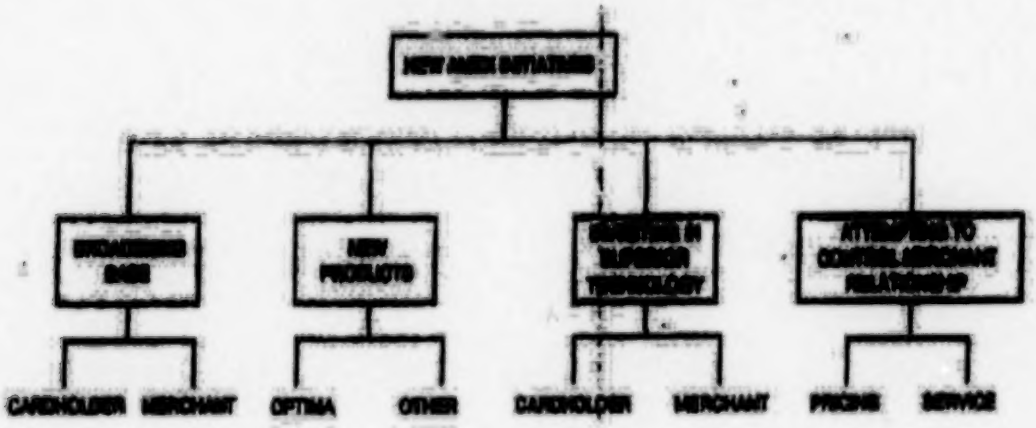
NEW INITIATIVES

"The past year was one of extraordinary achievements throughout all parts of TRS. It was also a period in which new strategic initiatives were launched that will pave the way for continued growth in the years to come."

Louis Gerstner Jr.
Ex-President
Amex Annual Report 1988

AMEX COMPETITIVE STRATEGY

NEW INITIATIVES



AMEX COMPETITIVE STRATEGY

NEW INITIATIVES
CONSUMER EXPANSION

"To attract consumers in our new targeted segments means developing a host of new services tailored to their needs ...

...the strategy is to broaden the utility of the card."

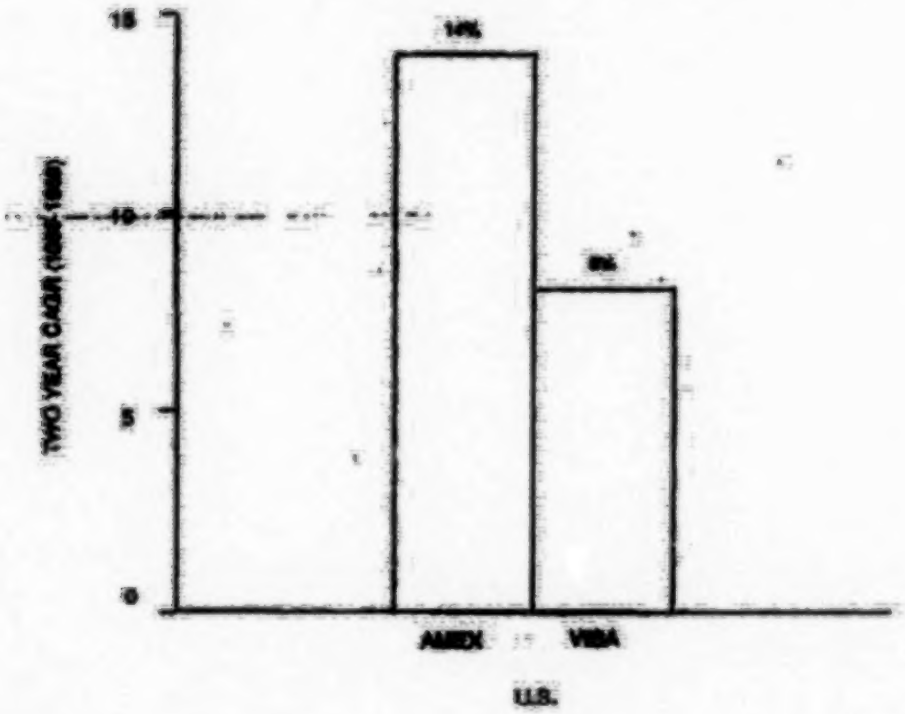
Edwin Cooperman
President
Amex Consumer Card Group

"By aggressively expanding its consumer base into new segments, Amex is expanding its card base at a faster rate than it did during the 1970's and the early 1980's."

Credit Card Management

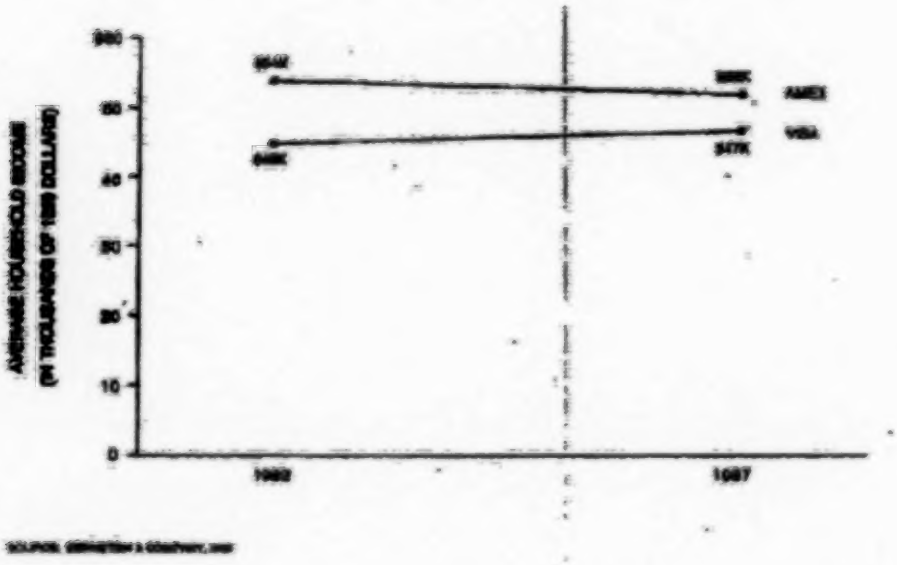
AMEX COMPETITIVE STRATEGY

NEW INITIATIVES
GROWTH IN CARDHOLDER BASE



AMEX COMPETITIVE STRATEGY

NEW INITIATIVES
CARDHOLDER INCOME

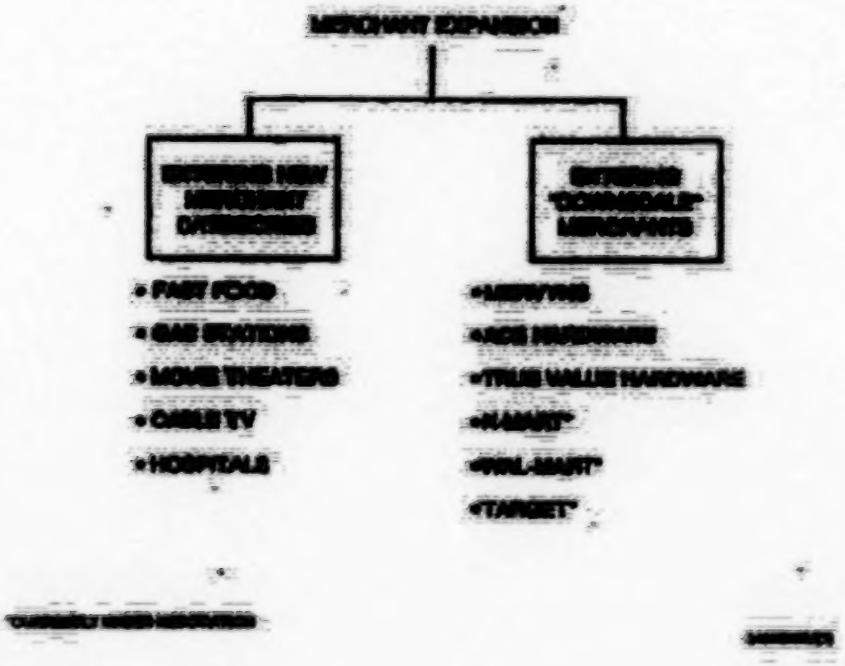


AMEX COMPETITIVE STRATEGY

NEW INITIATIVES
MERCHANT EXPANSION

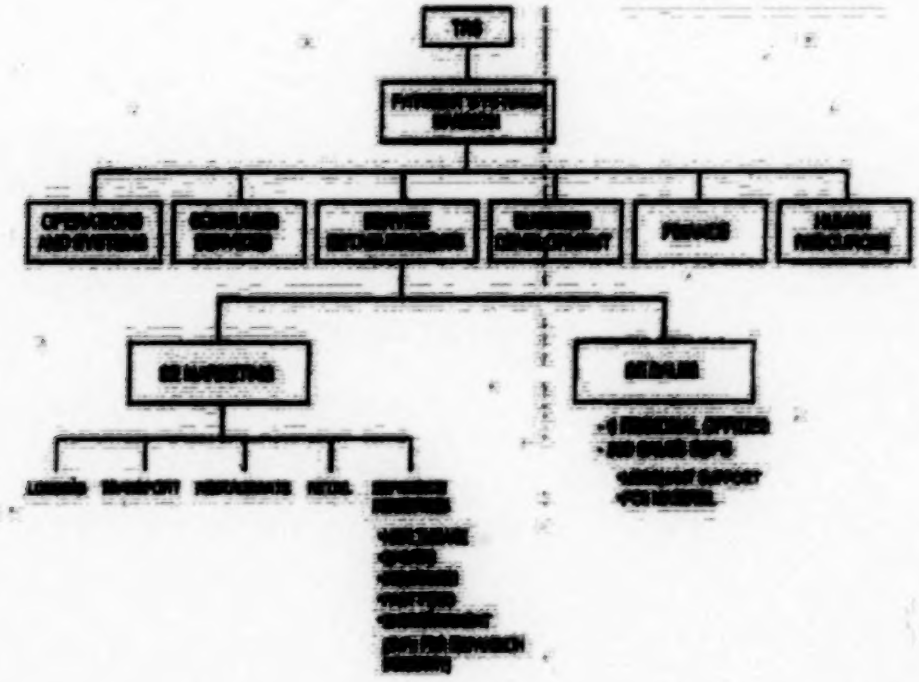
"Our thinking is that wherever the card members wants to use the card we want to be there, so long as its legal."

John A. Crewe
Vice President, Marketing
Amex Establishment Services
Division



AMEX COMPETITIVE STRATEGY

NEW INITIATIVES
MERCHANT EXPANSION



AMEX COMPETITIVE STRATEGY

NEW INITIATIVES
MERCHANT EXPANSION

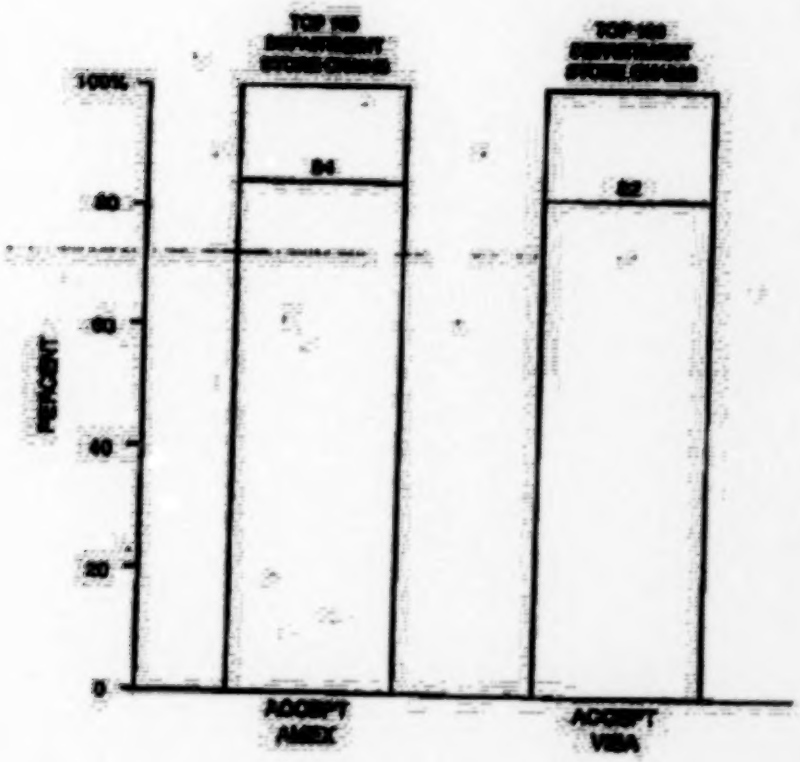
Pursuing Retail Agressively

"We look like a T&E card, we smell like a T&E card, but our biggest industry today is retail. That is currently our largest growing single industry."

Philip Riese
EVP, General Manager
Amex Service Establishment
Division

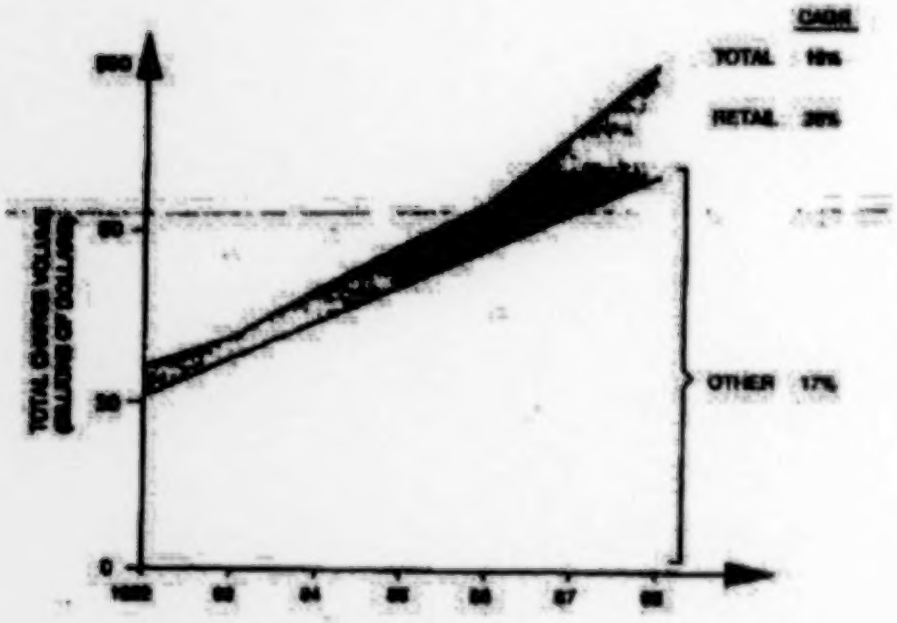
AMEX COMPETITIVE STRATEGY

NEW INITIATIVES
RETAIL ACCEPTANCE



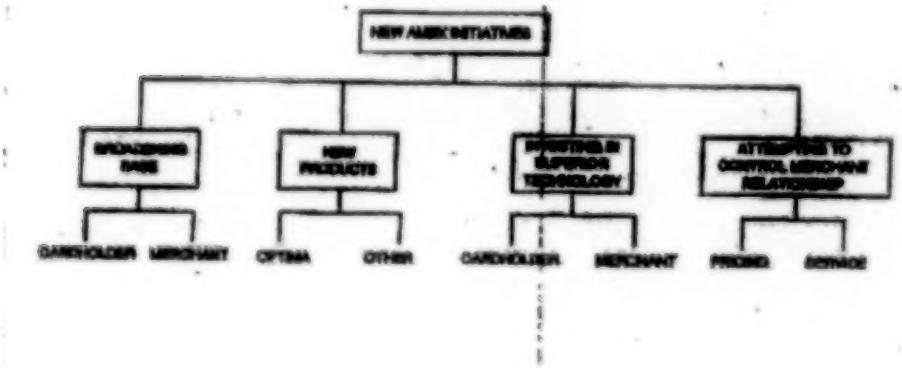
AMEX COMPETITIVE STRATEGY

NEW INITIATIVES
WORLDWIDE AMEX RETAIL VOLUME



AMEX COMPETITIVE STRATEGY

NEW INITIATIVES



"My goal is to put the Optima card into the wallet of every American Express cardholder."

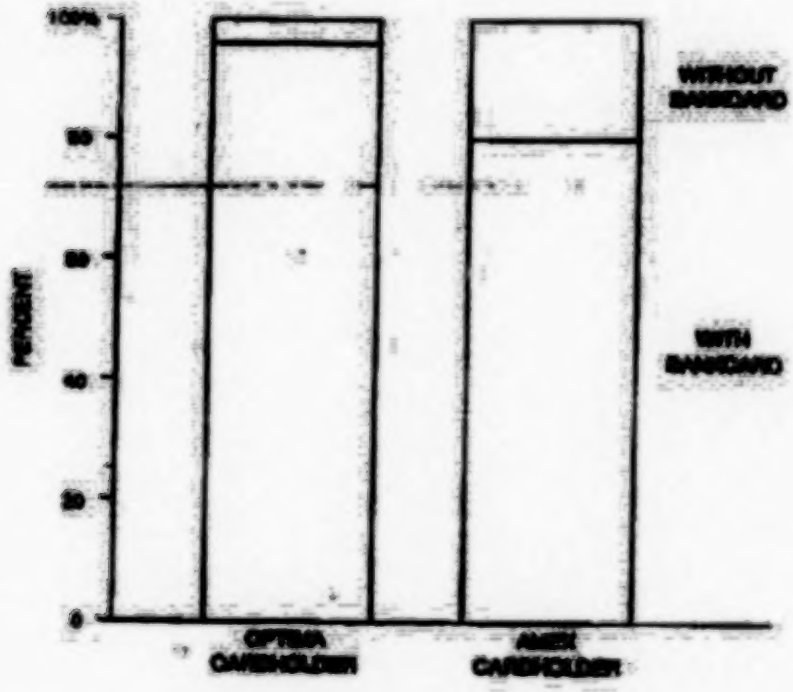
Anne Busquet
SVP – General Manager
Optima Card Division

"We are experiencing significant high quality growth in our consumer lending business, an area of great strategic emphasis for us."

Craig A. Streem
VP Investor Relations
Amex

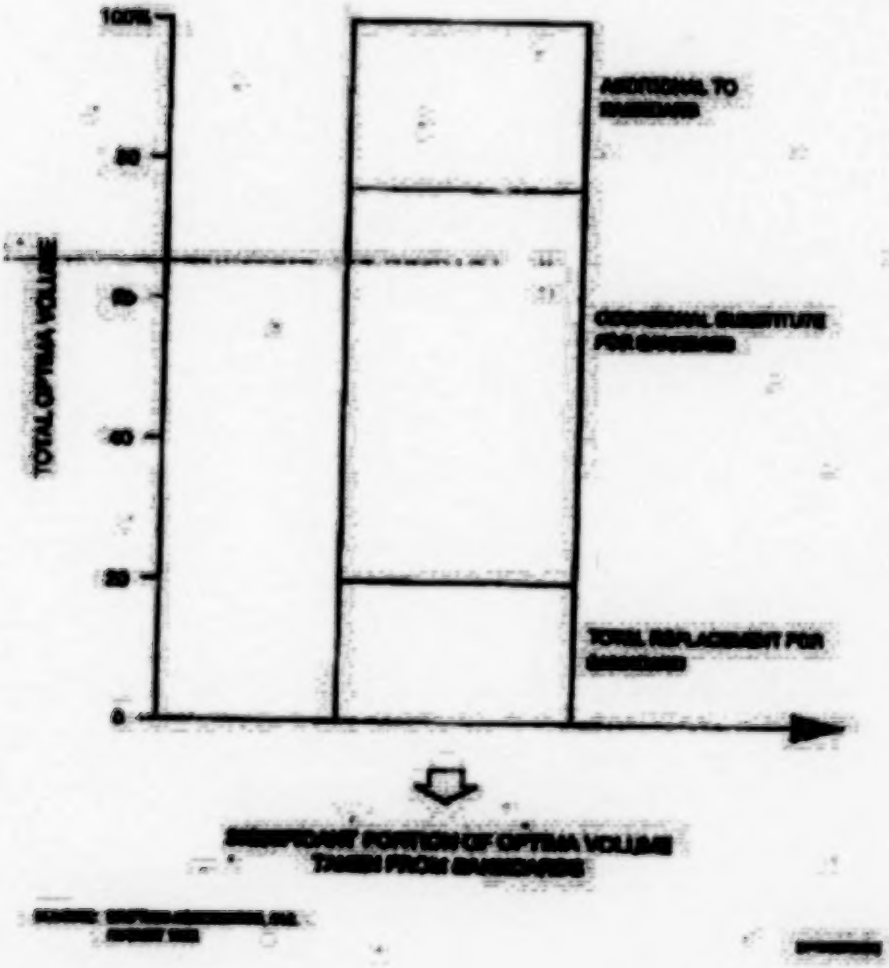
AMEX COMPETITIVE STRATEGY

NEW INITIATIVES
CARDHOLDER OVERLAP



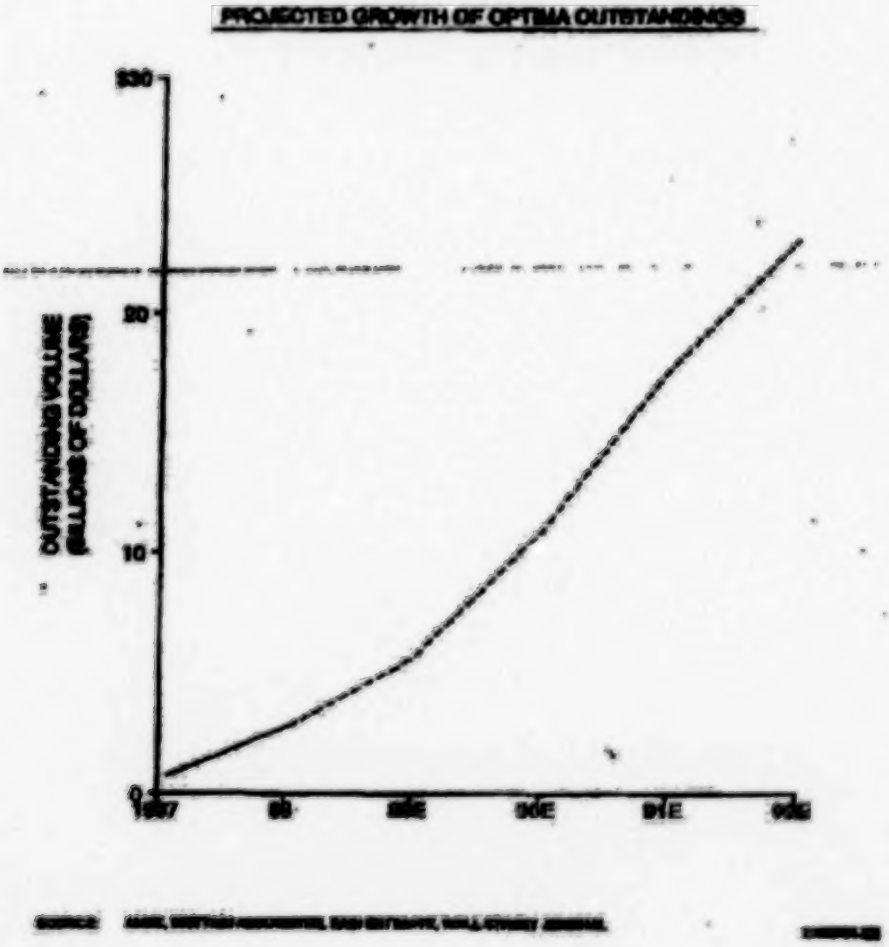
AMEX COMPETITIVE STRATEGY

NEW INITIATIVES
OPTIMA SUBSTITUTION FOR BANKCARDS



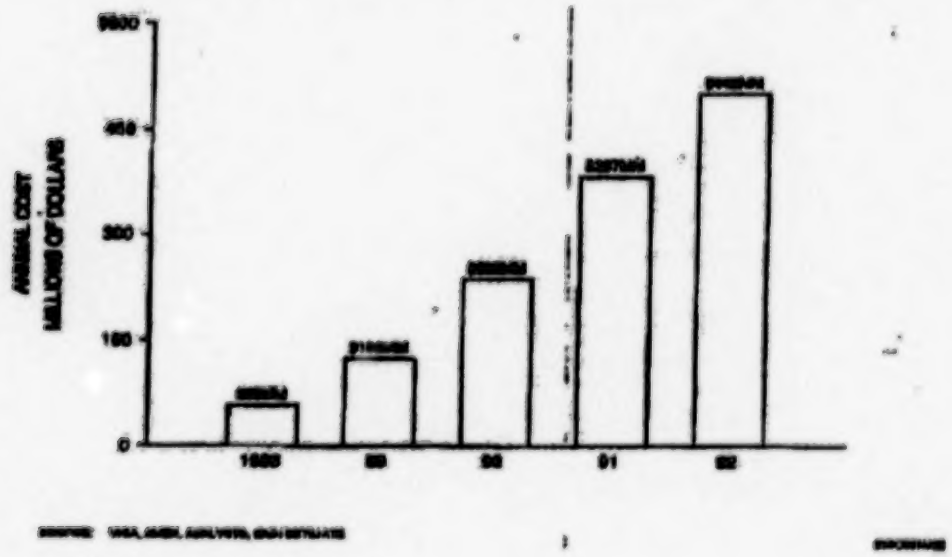
AMEX COMPETITIVE STRATEGY

NEW INITIATIVES
OPTIMA OUTSTANDINGS



AMEX COMPETITIVE STRATEGY

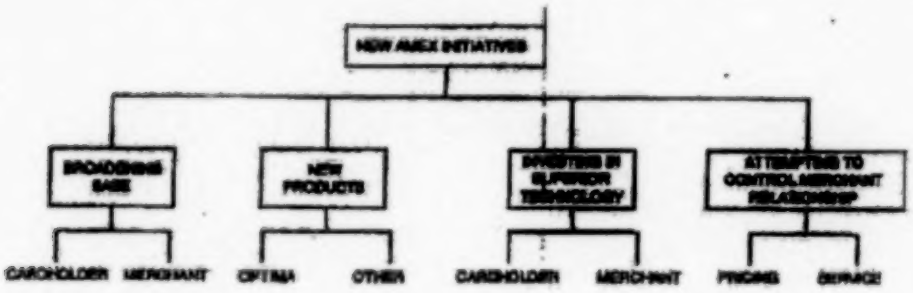
NEW INITIATIVES
COST OF OPTIMA TO BANK INDUSTRY



- Money market accounts
- Savings certificates (CDs)
- ATM cash access
- Home mortgages (under development)
- Consumer investment management
- Mutual funds (under development)
- Life insurance

AMEX COMPETITIVE STRATEGY

NEW INITIATIVES



Project Genesis

- A rebuild of all TRS' computer systems worldwide, integrating them into a single system incorporating all products and all regions
- Built around a massive database of all Amex's customer and merchants
- A $250MM investment over five years using the most advanced computer and software technology available

Insider Perspectives

"It is not a systems project, but more of a business vision."

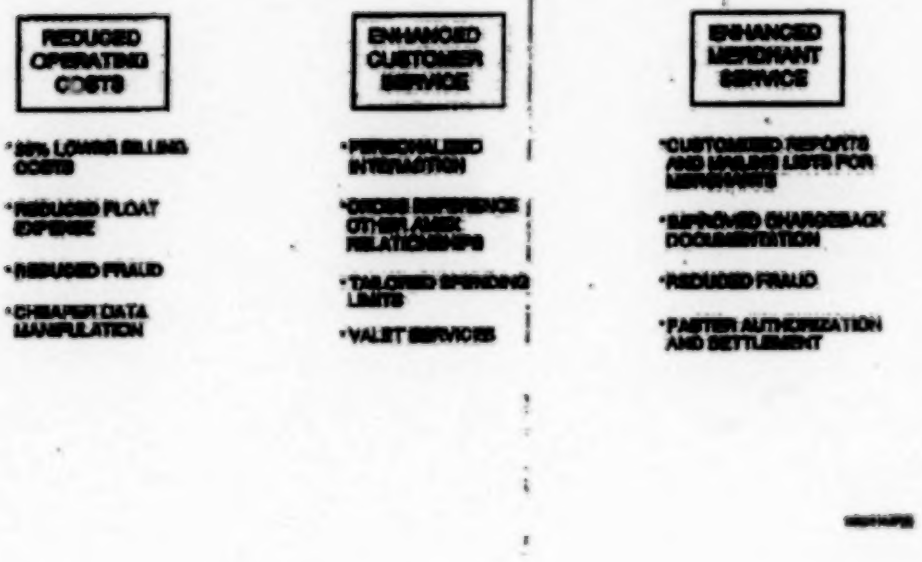
William Tindall
VP Operations and Services

"We are betting the ranch on the Genesis Project."

Kenneth Chenault
Executive Vice President,
Amex Platinum/Gold Card
Division

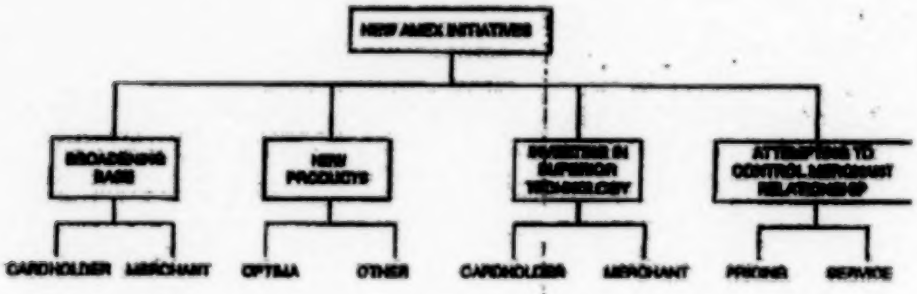
AMEX COMPETITIVE STRATEGY

NEW INITIATIVES
PROJECT GENESIS

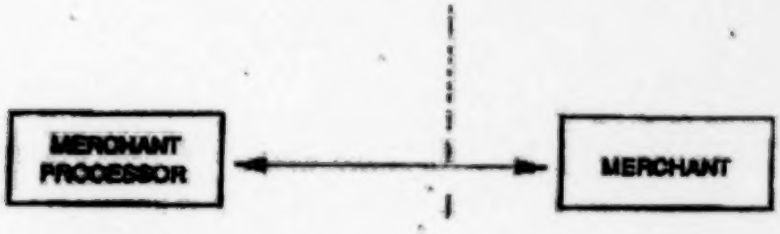


AMEX COMPETITIVE STRATEGY

NEW INITIATIVES



AMEX COMPETITIVE STRATEGY
VALUE OF MERCHANT PROCESSING



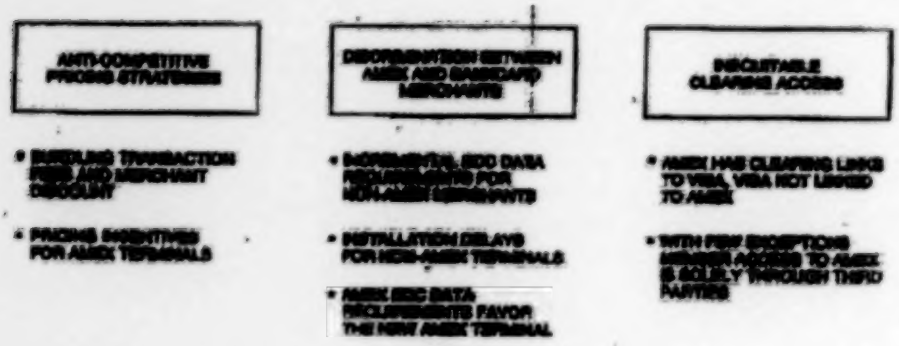
PROCESSOR CONTROL

- MERCHANT SERVICE
- AUTHORIZATION TIME
- TRANSACTION PRICING
- ACCESS TO INFORMATION
- ABILITY TO CHANGE PRODUCT REQUIREMENTS AND CAPABILITIES

AMEX COMPETITIVE STRATEGY

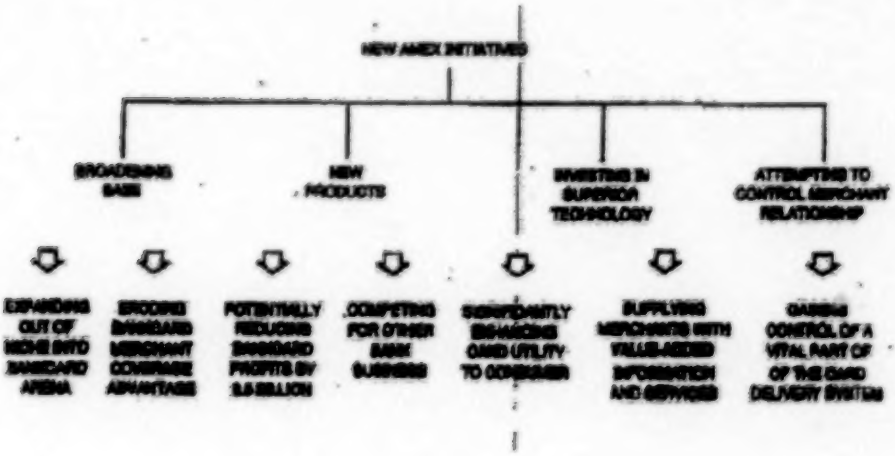
CONTROL OF MERCHANT RELATIONSHIP

AMEX TACTICS



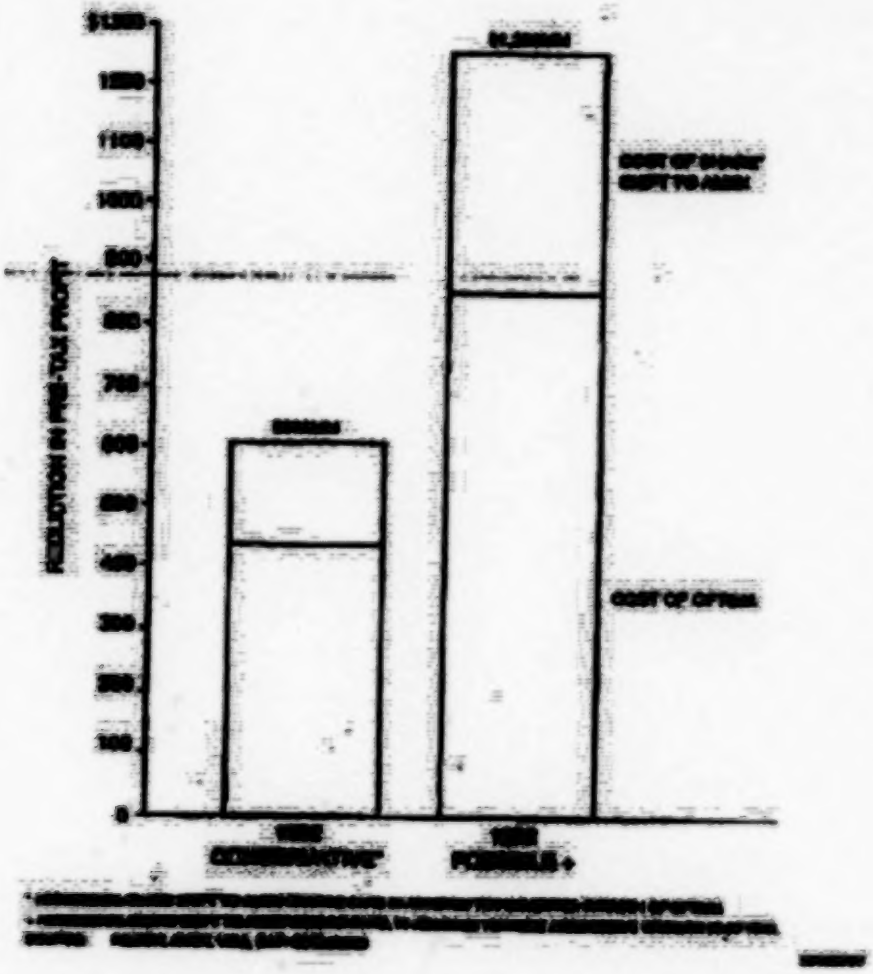
AMEX COMPETITIVE STRATEGY

NEW INITIATIVES SUMMARY



AMEX COMPETITIVE STRATEGY

NEW INITIATIVES
POTENTIAL ANNUAL COST TO
BANK INDUSTRY



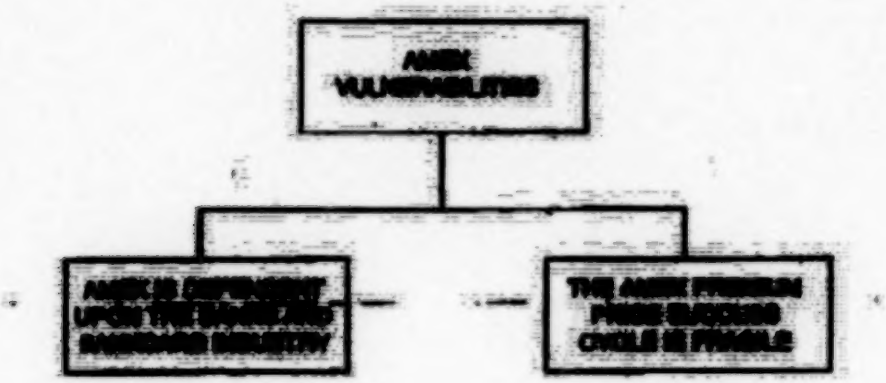
AMEX COMPETITIVE STRATEGY

AGENDA

- Amex overview
- Amex new initiatives and threats

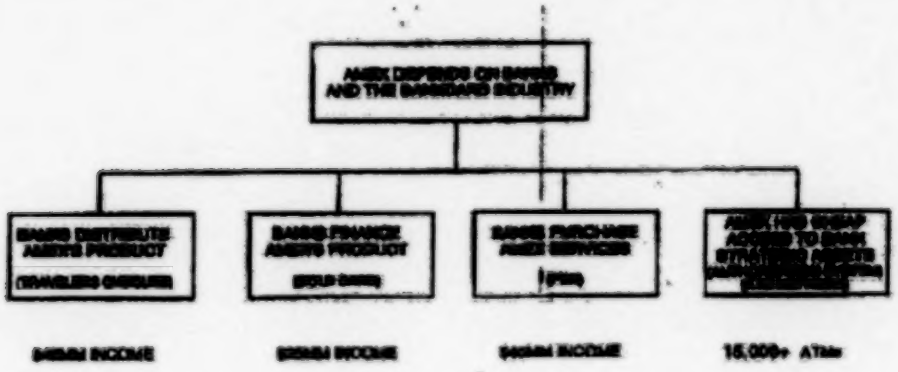
- Visa strategy
  - Amex vulnerabilities
  - Visa opportunities

AMEX COMPETITIVE STRATEGY



AMEX COMPETITIVE STRATEGY

AMEX DEPENDENCE



AMEX COMPETITIVE STRATEGY
RELATIONSHIP WITH BANKS

Fostering Interbank Competition

"Even if Optima had three million cardholders, how can any bank be concerned with that when fifty million bankcard customers are being taken from local banks by out-of-state banks?"

James T. Larkin
Amex VP

AMEX COMPETITIVE STRATEGY
RELATIONSHIP WITH BANKS

Amex Bank Manager Sweepstakes

"In an effort to reward the financial institution personnel that help American Express acquire new cardmembers, we have launched the American Express Bank Manager Sweepstakes...

American Express will award branch managers one sweepstakes entry for each card application approved from the bank's take-one displays...

Take one's are a cost-free maintenance-free program that lets your institution earn income from commissions paid for each approved card application."

Lou Eiler
Amex VP

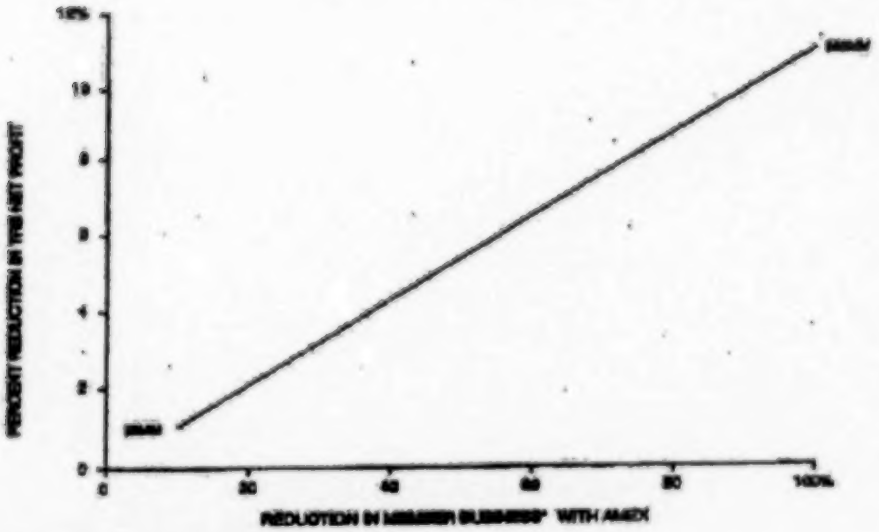
AMEX COMPETITIVE STRATEGY

BANK IMPERATIVES

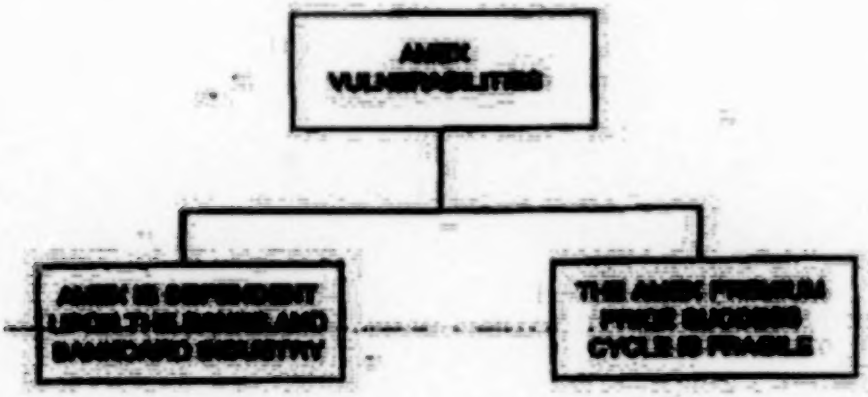
- Reduce member business relationships with Amex
  - Travelers cheques
  - Gold card
  - FDR
- Appropriately price access to bank strategic assets
  - Acquirer networks
  - ATM networks

Important and appropriate,
but not a fatal blow

AMEX COMPETITIVE STRATEGY
IMPACT OF BANK IMPERATIVES

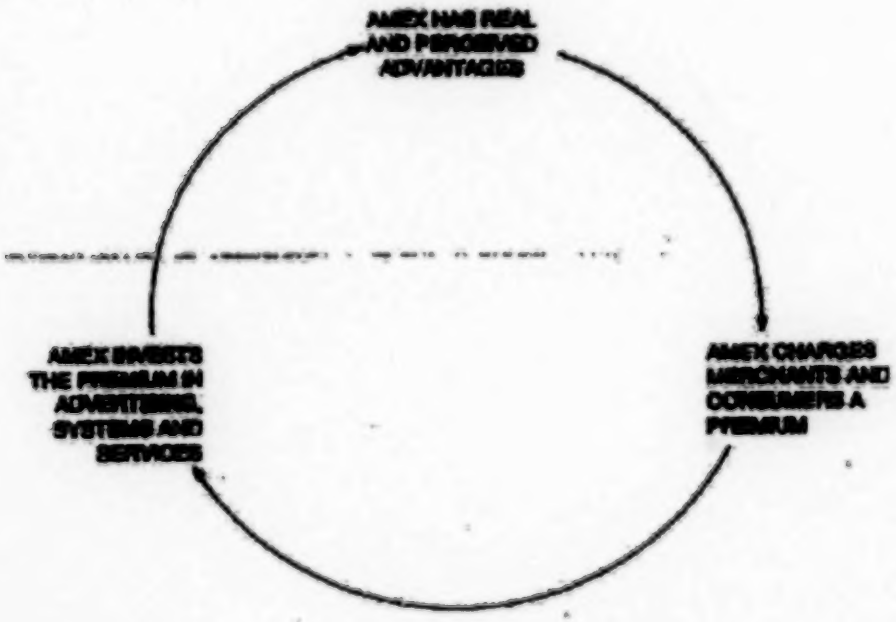


AMEX COMPETITIVE STRATEGY



AMEX COMPETITIVE STRATEGY

AMEX SUCCESS CYCLE

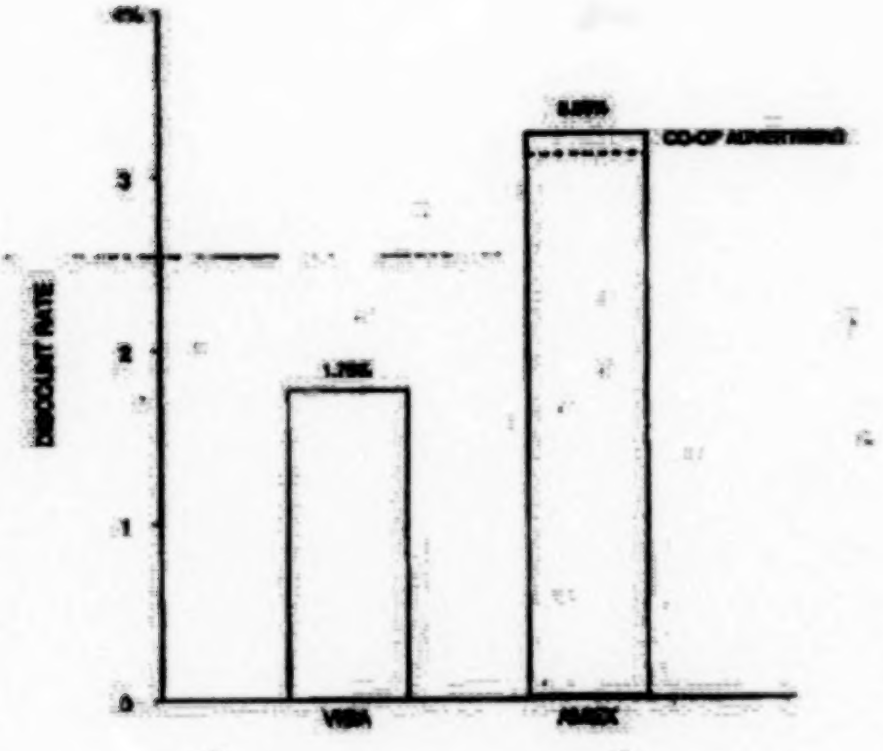


AMEX COMPETITIVE STRATEGY

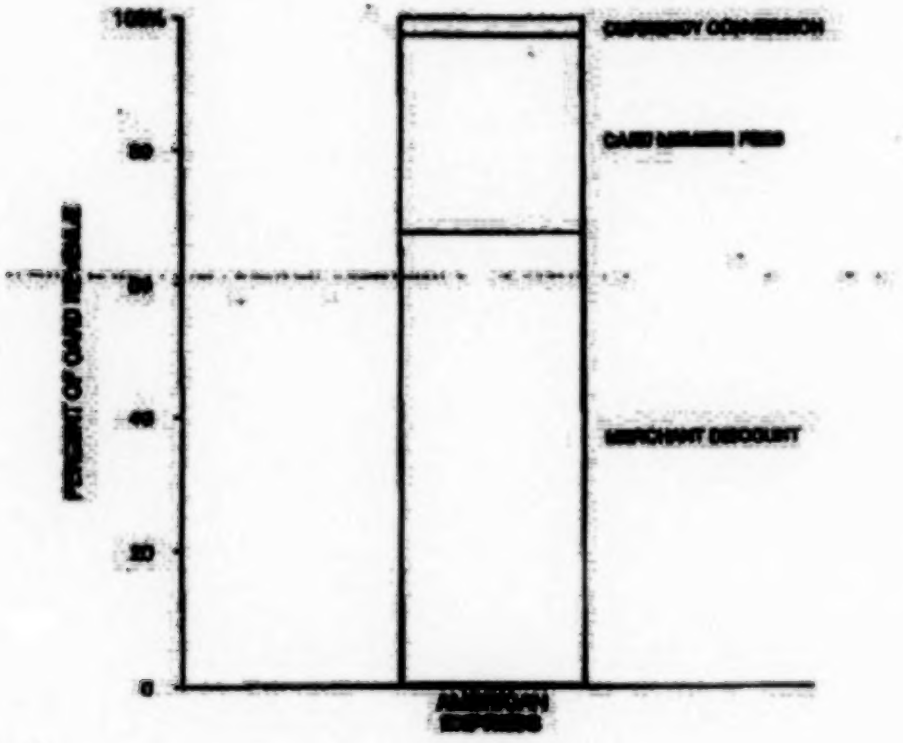
VISA STRATEGY

AMEX COMPETITIVE STRATEGY

MERCHANT DISCOUNT



AMEX COMPETITIVE STRATEGY
IMPORTANCE OF MERCHANT DISCOUNT



AMEX COMPETITIVE STRATEGY
MERCHANT PERSPECTIVE

"Merchant discount is the most important variable. We prefer Avis customers to use bankcards or Discover over Amex."

Assistant Division Controller
Avis Rent A Car, Inc.

"I would drop Amex. I absolutely hate it, but our chairman believes the Management Horizons data."

Director, Credit
Lechmere

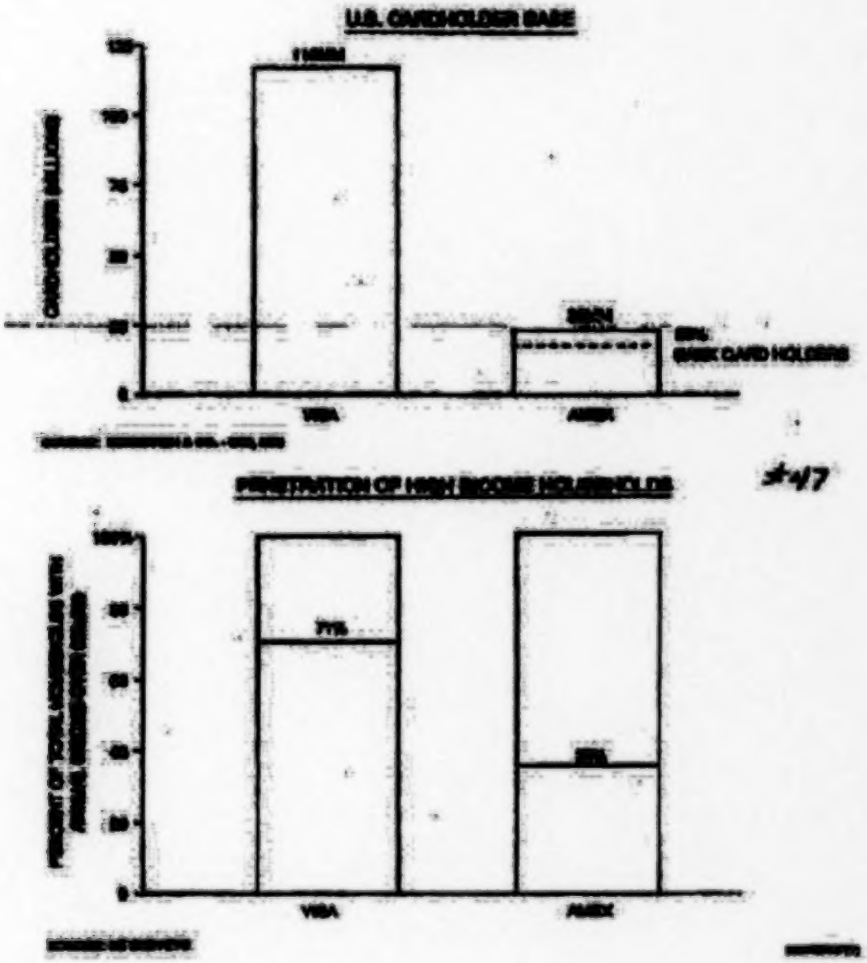
"We dropped Amex because pricing was too high and it didn't bring any incremental sales. There was minimal change in volume once the program was abandoned."

Corporate Controller
H.C. Prange Co.

"The big fallacy about Amex is that people think they provide a more demographically attractive customer... That may have been true ten years ago."

VP, Credit Operations
Bloomingdale's

AMEX COMPETITIVE STRATEGY
RELATIVE VALUE TO MERCHANT

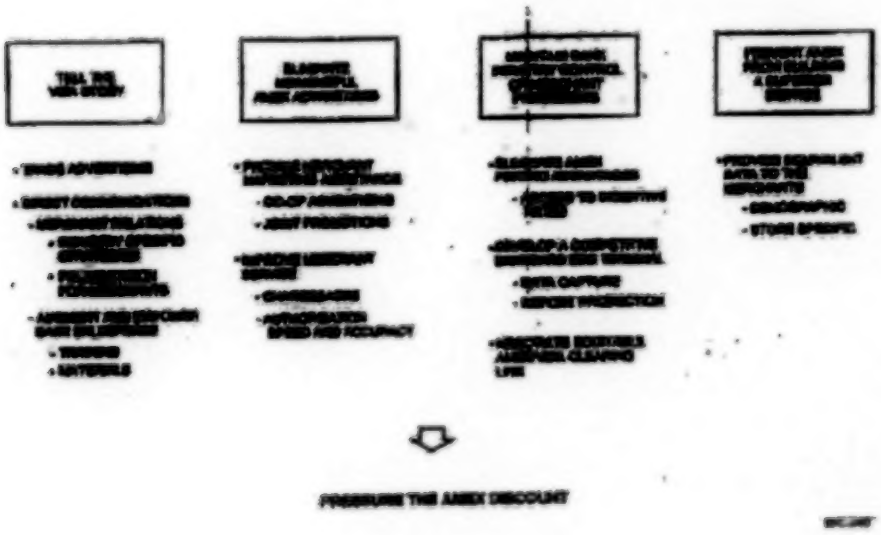


AMEX COMPETITIVE STRATEGY

AMEX STRENGTHS

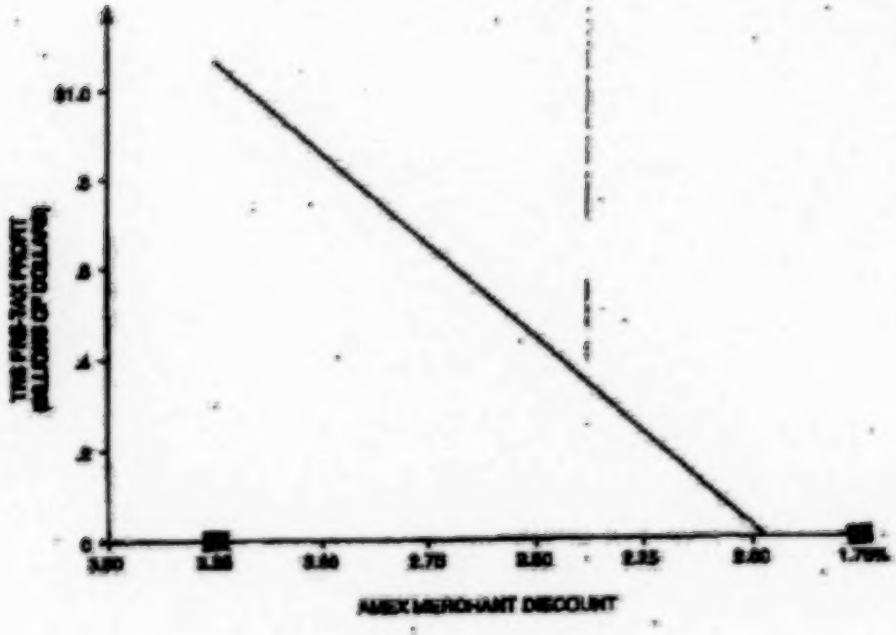
- Market themselves exceedingly well
  - Incremental sales story
  - Aggressive negotiating
- Provide value added services
  - Co-op advertising
  - Joint merchant promotions
  - Marketing advice
- Have the means to deliver message and service
  - Operations reps
  - Marketing reps
  - Promotion reps
- Building a potentially unmatchable tool for delivering merchant utility . . . Genesis

AMEX COMPETITIVE STRATEGY
VISA MERCHANT IMPERATIVES



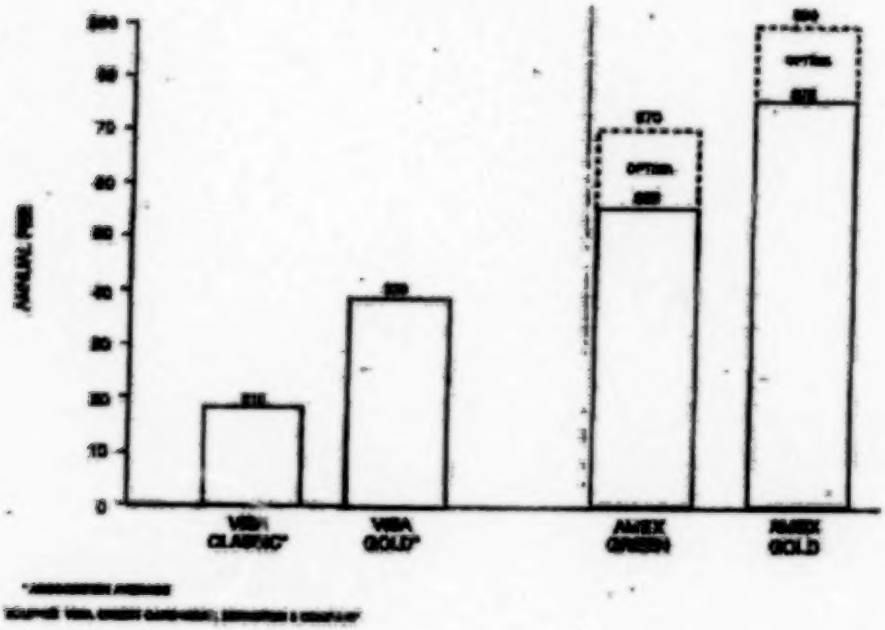
AMEX COMPETITIVE STRATEGY

IMPACT ON TRS PROFIT
MERCHANT DISCOUNT PRESSURE



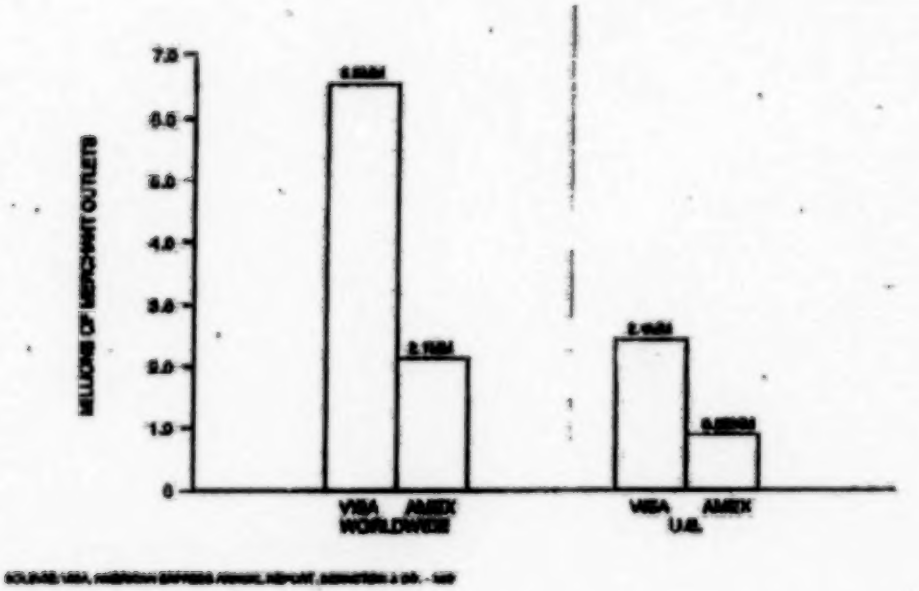
AMEX COMPETITIVE STRATEGY

CARDHOLDER ANNUAL FEES

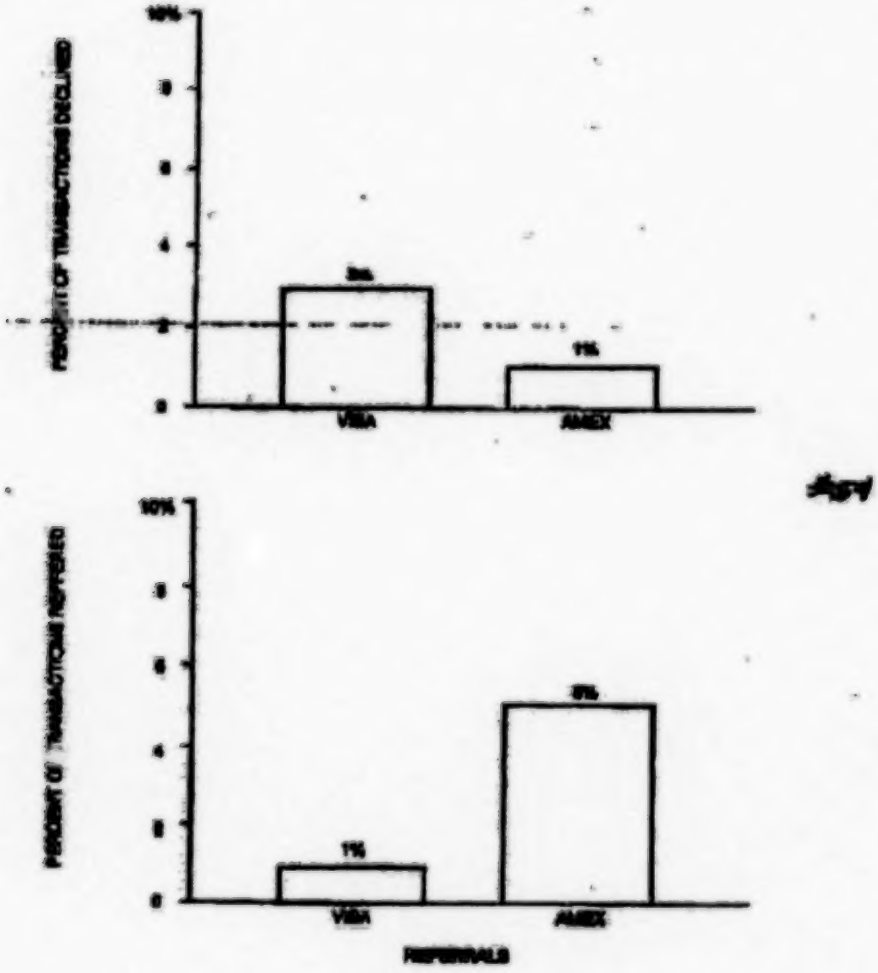


AMEX COMPETITIVE STRATEGY

RELATIVE ACCEPTANCE



AMEX COMPETITIVE STRATEGY
AUTHORIZATION PERFORMANCE



AMEX COMPETITIVE STRATEGY

AMEX ADVANTAGES OVER VISA

- Strong image awareness
  - Quality
  - Appropriateness
  - Worldwide acceptance
- Bias to authorize at POS
  - No pre-set spending limit
  - Low level of declines
- High quality customer service
  - Inquiry handling
  - Emergency card replacement
- Detailed transaction information
  - Country club billing
  - Annual summary

AMEX COMPETITIVE STRATEGY
VISA CONSUMER IMPERATIVES

Tell the Visa story

- Significant increase in educational consumer advertising
    - Acceptance, U.S. and worldwide
    - Appropriateness

Eliminate meaningful Amex advantages

- Strengthen Visa image and appropriateness
    - Visa image advertising
    - Situational advertising
    - POS material distribution support
- Improve Visa authorization procedures
    - Reduce erronenous declines
    - Develop issuer performance standards
    - Encourage frequent credit limit reappraisal
- Enhance customer service
    - Quality assurance function
    - Improve communication
- Provide detailed transaction information
    - Increase data capture
    - Develop and distribute billing report software

Increase consumer preference for using Visa

AMEX COMPETITIVE STRATEGY

IMPACT ON ANNUAL BANK PROFIT

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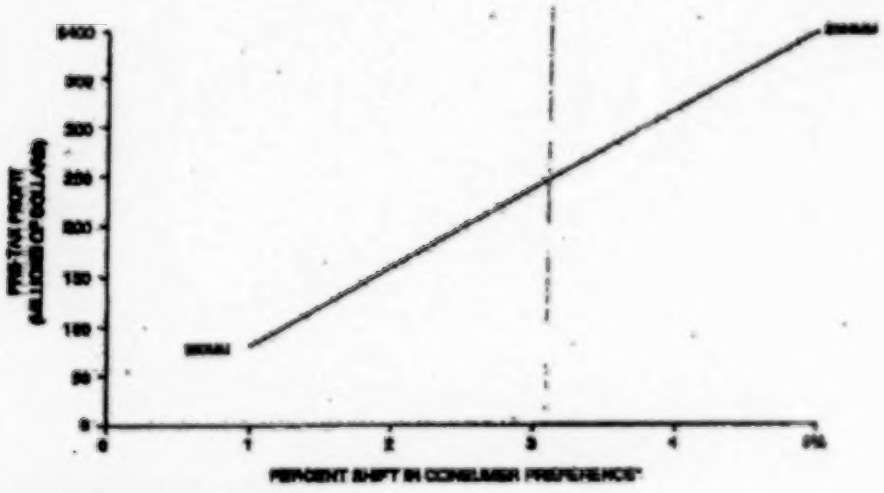

AMEX COMPETITIVE STRATEGY

CONCLUSION

- Amex is an enourmous threat
  - $1.25B potential cost to bank industry by 1992
- Amex has two main vulnerabilities
  - Bank dependence: not a fatal weakness
  - Premium price success cycle: will not withstand an attack from a determined competitor
- Visa should remove meaningful differences between itself and Amex
  - Weaken Amex's ability to compete
  - Increase Visa's market share

MARKET SHARE
THE WILL TO WIN

Kenneth I. Chenault

Establishment Services Worldwide Meeting
Puerto Rico
January 23, 1996

I. DEFINING WINNING AS MARKET SHARE.

- I'm delighted to be here. This is an exciting time for the company and it's an exciting time for our Establishment Services business. As many of you know, I have a special fondness for this group. I really do regret that I don't see many of you as much as I did in the past. You are an amazing group of talented people. It's gratifying to see the turnaround in our performance, and to see that people have been stepping up to the challenge.
- I want to commend Tom Ryder on his outstanding leadership. What he did was not just to devise a strategy. He really instilled in this organization a Will to Win, and he instilled in people a will to stretch themselves. Tom really loves the SE businesses. He likes and respects you people, and I know he's going to do a terrific job running International. We cannot be a growth company unless we grow outside the U.S. You prepared him well and we're fortunate to have him. Thank you, Tom, for your courageous leadership.
- I know how excited David is about working with you to address the challenges ahead. David is a tremendous executive. I feel absolutely great that he is at the helm. He's results-oriented, he cares about people, and he's focused on winning. There's no question he has what it takes to lead this organization to great heights.
- As we look at where we are today and where we're going, it's important for us to drop back three or four years, and remember that, at the time, a lot of people wondered if American Express would survive. That may sound dramatic, but in a real world context, it's not. Companies go out of

business. In fact, 40% of the companies that were on the Fortune 500 in 1985 are out of business today.

- As I've mentioned to some of you, I recently read a book by two Stanford Business School professors on this very subject. The book is called Built to Last. And the authors studied American companies to try to figure out what it is that gives companies staying power. What is it that enables companies to sustain leadership over decades rather than years.

- The authors found only 18 companies that are, in their words, Built to Last. These are companies that have been around for anywhere from 50 to 170 years. Some of what the authors found may surprise you. Some of it will sound familiar.

- First, they found that companies with staying power are built around an ideology that relies more on experimentation than on strategic planning. They're not saying strategic planning is not important. But, in fact, the key ingredient in these 18 companies was the willingness to experiment. The key to longevity, these authors suggest, is not just sheer brilliance. In fact, the key seems to be establishing the kind of organization whose values and ways of thinking can last through generations of shifting business strategies.

- And these companies, whether they recognize it or not, appear to have shared an adherence to the Chinese principle of dualism, wherein they embrace a series of opposites -- like stability and change, clarity and ambiguity, integration and autonomy. Companies with staying power have

broadened their horizons beyond the typically Western "either/or" approach.

- Now, I said some of this would sound familiar. And it should. Because American Express is one of the 18 companies held up as an example of what others should aspire to -- despite our problems of the last several years. American Express is on the list with Coca-Cola, Procter & Gamble, Motorola, 3M, Hewlett-Packard, Disney and others. We're on the list. You don't find, frankly, as many glowing paragraphs on us as you do some of the other companies. But we made the list. That should give us a lot of confidence.
- This book was not a PR effort. American Express had no influence on the academic study. But as outsiders looking across all companies -- in all industries -- American Express emerged over the long term as a winning company.
- While we have talked a lot about the will to win recently, I'm not convinced that we know -- and that we really understand -- that we have what it takes to win. We've been playing catchup for the past few years, and it can be demoralizing to see that Visa and Discover are growing faster than we are. Individual card issuers like MBNA and Citibank are growing faster than we are. We're also losing share to new payment instruments, such as debit cards.
- But we are turning American Express back to our long held position as a winning company. Three years from now, I predict we will be growing faster than the Card market and in many of our markets around the world, we will be widely recognized as

a winning company. And we will see that we went through a three-part turnaround to get there.

-- The first part of the turnaround was a Financial turnaround completed over the past 3 years. We sold off non-strategic businesses. We strengthened the balance sheet. We drove through the first phase of Reengineering.

-- The second part of the turnaround is both a structural turnaround and process redesign. This is the phase we're still in -- Reengineering everyone of our core business processes to achieve Best-in-Class economics, while also accelerating our cycle times and fundamentally redesigning our core processes from the customer's perspective.

-- We are ready now for the third, which we have begun. We are beginning the third phase of the turnaround -- a mindset turnaround.

- We have to shift from a mindset of survival to a mindset of winning.
- We have to restore our confidence as we market our current products, deliver our services and launch new products and services.
- We must, once again, have a collective pride in our Company.

• I think all of us here at this meeting intuitively want to help drive this mindset turnaround, and strengthen our ability to win in the marketplace.

-- First of all, I want to commend this group for your attitude, your concern for our SE

customers, and your consistently high energy level through a very stressful time.

-- I especially want to acknowledge the very creative and outstanding work being done by the New Business Partnerships team, by Tom Pojero and the ESA channel, Jim Howland and his team in Merchant Processing, Judy Hoffstein and Inside Sales, and, of course, Lew Taffer and the entire Travel SBU for your work in helping us to land our first two cobranding partnerships.

-- I could go on. So many individuals in SE made real contributions in 1995, and worked toward creating lasting value. I cite these few to illustrate that we had contributions from a broad range of activities within SE. We reached these objectives because you acted as a team.

-- I also think there are a number of skills and attributes within Establishment Services that I'd like to see adopted in other parts of the organization -- specifically with respect to opening new channels for our products and services.

- There's no doubt in my mind that this group can help drive the mindset turnaround at American Express.

II. THE MINDSET TURNAROUND

So let me turn this discussion to the key components of the mindset turnaround. How will we move from a focus on survival to a focus on winning?

-- First, we need to define winning. I will argue that the only real measure of winning is market

share. We will only win when we serve our customers better than our competitors. And while we can take some comfort in our customer satisfaction scores and in our earnings growth -- and lately, the price of our stock -- the only real way to prove that our customers prefer us is to measure market share. It's the only true barometer of success, and our progress against it will determine whether we have a viable and winning business in the future.

-- Second, we need to have confidence that winning is achievable and worth the price. While I strongly believe that we can and will win, I also know that it's not easy or risk-free, to grow faster than the market. We'll have to take calculated risks -- risks with pricing, risks with marketing investments, risks with new products, risks with new channels -- if we're going to get out in front of the competition and stay there.

-- We look at the consumer business. Citicorp and Discover are two key competitors. In our Corporate Card business, GE and soon AT&T are coming right at us. For SE, FDC has emerged as a formidable competitor, and there are others. We need to understand everything about them. We need to understand how we can best them. And there are other competitors from whom we need to take best practices. We need to understand that we will only gain market share if we take it from someone else.

-- Third, we need each of you to lead the charge on winning and market share. We're going to have to think more like General Managers, and

understand customer needs, understand the competitive environment and our business strategies. And we're going to have to become comfortable making trade-offs and establishing priorities. We're going to have to get more comfortable with the "dualism" I talked about earlier, and operate in an environment characterized by opposites such as ambiguity and clarity, stability and change.

- I know there are trade-offs we have to make. But our choice is not between market share and profitability. We have to grow both. Remember that the company with staying power, the company that's Built to Last, doesn't see things in the typically Western "either/or" paradigm. I would look to Coca-Cola, Schering Plough, and Gillette as companies that are aggressive about market share and economic profitability.

III. MARKET SHARE

Now I'm going to show you the root cause of my concern for our market share. (This is your only slide. Pause for effect. Let it sink in and leave it there.)

- Our share of General Purpose Plastic Spend in the U.S. has declined steadily since 1984. At that time, it was about 26%. Today, it's about 17%. We are not losing share as fast as in the last few years, but we are still losing share.
- Visa in particular is growing charge volume faster than we are. What's encouraging is that in last year's third quarter, for the first time, we grew at a rate that was faster than MasterCard. Our charge volume, measured at the Point of Sale,

grew 14.4%, while MasterCard's rose 13.4%. This is good news, but it's important to remember that we're trailing Visa -- and particularly Discover -- by a wide margin, and newer competitors, like FDC, are emerging.

- Outside the U.S., we're losing share in most of our markets. Charge, Credit, and Debit continue to grow at double digit rates around the world. And we're not keeping pace.
- Now we can debate whether General Purpose Plastic Spend is the right bogey. We can debate whether we should include cash advances as part of spend -- that may change the facts somewhat.
- I'll tell you what's not debatable. We are behind and we are going to have to grow market share substantially in terms of charge volume and share of outstandings. This is the game we are in for the Card business. We must become more relevant in the marketplace by becoming more relevant in our customers lives. We can't explain away our decline. We must reverse it.

IV. WHY MARKET SHARE IS ACHIEVABLE

- There are four reasons why I believe we can and will gain market share in our core businesses, especially the Card Business:

1. We compete in growth businesses, so there's still room to maneuver.
2. We have fundamental advantages versus competitors.
3. We have practical plans to address our core issues.

4. We have proven that we can gain share if we're willing to take risks.

- I've heard arguments that we should constrain investment in the Card Business. That it's mature. That the game's already over. Well, that's simply wrong.
  - -- Global charge volume exceeds $1.2 trillion.
  - -- The U.S., which is the largest of the markets worldwide, is growing in excess of 17%. And even through the recession of '90-'93, grew at a 13.7% rate. Emerging markets, such as Asia and Latin America, are growing at 25-30% a year. And these growth rates understate the potential of the market because they do not include debit and other new payment instruments.
  - -- General Purpose Plastic today accounts for only 8% of Global Consumer Spending. The Nilson Report projects that by the year 2000, charge volume globally will exceed $3 trillion and that by the year 2005, it will exceed $5 trillion.
  - -- The Card Industry generates more than $132 Billion in revenue, making it one of the World's largest industries.
  - -- These are not the characteristics of an industry that's mature and over-the-hill. These are the characteristics of a growth industry.
- The next question clearly is this: "Can American Express compete effectively with Visa and MasterCard?" That's a harder question, but I think we need to remember that we have some real advantages vs. the bankcards:

1. We're the biggest issuer in the World, which gives us powerful scale and brand leverage.
2. Only we and Citibank have global capabilities.
3. We have the strongest brand position in the industry.
4. We have unique product attributes and the perceived best rewards program.
5. We have the most attractive customer group.
6. We command premium prices in both our consumer and Corporate Card businesses and our S/E business.
7. We lead in convenience spending -- pay in full -- which is the fastest growing sector in the industry.

- I think we've proven that we can win in the marketplace when we've had the confidence to take risks.

  -- It wasn't that long ago that we believed we could not market Optima to the general public without cannibalizing the Charge Card. But a little over a year ago, favoring market share over short term earnings, we aggressively launched Optima True Grace. We developed a new marketing channel -- stand-alone credit card products. We've seen a healthy increase in our U.S. Consumer business. Yes, we saw some cannibalization. But frankly, some of the Cardmembers who migrated to True Grace are more profitable to the franchise with a revolving product.

-- We've also proven that aggressive Acquisition offers can increase response rates, leading to new growth in the oldest of our Card products. This is significant. For too long, we've labored under a myth that Charge Card is a handicap in today's marketplace. But I believe that with the right value proposition, the right combination of service and rewards, we can turn Charge Card into a growth product again. The American Express Charge Card is the lead entry in the fastest growing sector of the market -- convenience spend. And the Charge Card's positioning impacts our ability to command premium discount rates.

-- I think it would be easy -- and foolish -- for us to blame the economic structure of the Charge Card product for our loss of market share in the U.S. Contrary to popular opinion, fee does not drive this market. It drives part of the market -- no question. But with the Platinum Card and the Rewards Plus Gold Card, I think we've proven beyond a reasonable doubt that where the value proposition is compelling, the demand for premium products is strong.

V. ROLE OF ESTABLISHMENT SERVICES WORLDWIDE IN GROWING MARKET SHARE

- Some of you may well be asking yourselves, What does this have to do with my job? How can I possibly contribute to market share growth?
- Growing market share is not something that's done in a vacuum. Responsibility doesn't fall solely to Card Marketing and Advertising. In fact, I

would argue that responsibility for the most critical factors rests with the people in this room.

- Because while the competitiveness of our Card Value Propositions is driven by many factors, welcome acceptance is the core promise of Payment Systems products. Without welcome acceptance, the rest of our value proposition has only marginal value.
- I am fully aware that building full coverage is a daunting task, and expanding coverage must coincide with increasing Cardmember demand. We need to continue to push for creative solutions in both areas.
- For while our spending coverage stands at 87% in the U.S. -- and we're proud of that achievement -- there are markets overseas in which American Express has been marginalized. We have a coverage gap that is seriously undermining our relevance and, as a result, our ability to price at a premium. We must -- in the U.S. and around the world -- eliminate both the perception and the reality of the coverage gap. This is an incredible challenge.
- So we need to be far more serious about sharing our skills globally. We need increased global leverage in several areas, such as SE Pricing and Services, and we need to think about managing our some of our SE Customer Relationships globally.
- Remember that some of our leading competitors pursue basic operating processes more efficiently than we do. In some processes, our cost or margin

disadvantage is as high as 50%-75%. If we allow this to continue, we will lose.

- So with this new mindset -- as we take a more external approach and see ourselves as our customers and potential customers see us -- there can be no letting up on our determination to achieve Best in Class economics. It is absolutely critical that we achieve Best in Class, and that we reinvest in our future.
- And the dedication and commitment that this group has demonstrated to reengineering is just outstanding -- really a model for the organization.
- In many ways, Establishment Services leads the organization in being open to new ways of doing things. The ESA channel is a prime example. Many of you remember how horrified some of our colleagues were at the thought of working with external sales agents. I remember the reaction to this at our sales meeting in Hawaii. But ESA has become a critical distribution channel for us -- delivering 135,000 merchant signings a year.
- And Inside Sales has developed new ways of signing and servicing smaller merchants. You've found a way to make this channel profitable for us.
- New Business Partnerships has shown all of us how shared goals and teamwork can translate into performance. What a year this group had -- with supermarkets, gas stations -- and they capped this terrific year with Wal-Mart.
- And let's not forget that our co-branding opportunities begin here -- with the relationship in SE. Our co-branded Hilton Card -- launched only 4 months ago -- is doing better than either we or

Hilton thought. And our Delta Sky Miles Card -- on the market for all of three weeks -- is off to a great start. We're talking with other SE partners about cobranding opportunities.

VI. MOMENTUM

- Now, I want to stress here that we're not starting from ground zero. Our momentum is building.
  - -- We've launched more products and services in the past year than the prior decade.
  - -- We transformed Membership Miles into Membership Rewards, expanding our travel and non-travel rewards categories. We took the program into Australia, Argentina, South Africa, Taiwan and Brazil, bringing the number of countries in our rewards programs to 26. It is now the largest rewards program in the world.
  - -- These new value propositions give our Card members more reasons to insist on paying with American Express. And that's the most powerful endorsement anyone could ask for the price-value equation.
  - -- Our spending coverage, as this group well knows, is at 87%. We're signing a new SE every two minutes, and we're making progress in closing the Perception of Coverage Gap.
  - -- And we're thinking about new business opportunities in new and creative ways. We're forging alliances. Major bankcard issuers like Wells, Fargo and Bank of America are selling merchants on accepting American Express. Leading banks in Portugal, Greece, Israel and South Africa are issuing the American Express

Card and signing merchants locally. We're negotiating with major SEs for co-branding opportunities, and we're talking with major direct marketers about possible joint offers.

-- We're neutralizing Visa's efforts to get We Prefer Visa campaigns off the ground. We stopped at least a dozen such campaigns last year. We just wouldn't take no for an answer. And that's the kind of attitude we need to win in the marketplace.

-- And in Reengineering, we've also made significant progress. We've streamlined our Field Sales offices from 85 to 10. We've cut our support staff by 100 positions. In Merchant Processing, we've lowered our per ROC transaction cost by 14 cents -- or $14 million a day.

VII. DISAPPOINTMENTS

- But we've also had a number of disappointments.
- As you saw earlier, we are not growing as fast as the market either in Charge Volume or in Outstandings. This is the real score that determines if we are winning or losing.
- Our organization still does not move fast enough. It still takes us too long to launch products. While we've cut our new product development cycle time to a matter of months, remember that MBNA, on the issuing side, launches a new Card product every 7 days.
- Within Establishment Services Marketing, I think we need to take a hard look at our Co-op Advertising. Are we satisfied that it's really cost

effective? Does it add enough value to our Service Establishments?

- We have done a good job of reengineering U.S. Card, but we are behind where we need to be in International and Travel. In both cases, we have strong plans going into 1996. In staff reengineering, we have made good progress against our POA dollar targets. This year we need to engage in press redesign.
- Internationally, our Value Propositions are not competitive. Our competitors are growing Charge Volume in some markets at rates ranging from 40%-50% higher than we are in Europe to 3-4 times our growth rates in Asia and Latin America. New Card account growth is not strong enough and Card attrition remains too high.
- Addressing these issues -- fixing the fundamental value and market share gap -- is a prerequisite for achieving our vision of becoming the world's most respected service brand.

VIII. THE NEXT 6-12 MONTHS

- What does this mean for the next 6-12 months?
- Frankly, I'm not tremendously worried about 1996. The financials are difficult but achievable. I think we'll get to 90% spending coverage. The bigger challenge is in positioning the business for the next 2-3 years. What I'm concerned about is '97-'98. Because the closer we get to our aspirational targets, the harder it gets to deliver. This is why '96 is so important to our future. To meet our target this year, we'll sign an additional 300,000 SEs. We can do that. But for us to be able

to meet our targets in 1997, we have to sign an incremental 411,000 SEs.

- If you looked at a trendline of our revenues, you could feel encouraged. But that trendline is contingent upon our ability to maintain premium pricing. Do we think that's a sure thing?
- We've got to develop new revenue streams, new business opportunities, and we've got to sharpen our focus on Best In Class economics.
- One area where I know you're going to focus is in Client Management Reengineering. We have to fundamentally redesign the way we interface with our SEs to improve service while cutting costs. I believe you've identified $85 million in potential savings -- just from changing the way we manage our customer relationships.
- Another area, as I said earlier, is contractual advertising. We spend $110 million here, and we believe we may be able to reduce that by as much as $50 million.
- You need to know that the rest of the enterprise is working to support your efforts.
- We're going to optimize value from the products we've introduced in the past 12-14 months.
    - We're focused on Loyalty and Spend to build Market Share. We're going to be more aggressive about Card and SE acquisition -- especially in key International markets -- and we will continue to forge alliances that will help us increase our penetration.
- We realize that we can't win in every country in 12 months. We need to focus. So we've prioritized

markets, and we've built a $70 million War Chest to support strategic initiatives in 7 core markets outside the U.S.

- We will finalize our Brand Management Strategy to enable us to extend the brand to new businesses, such as Financial Services Direct, as well as extend the brand globally.
- In Reengineering, we will achieve our POAs for U.S. Card, and we will accelerate programs for Travel and International. In Staff Reengineering, as I said earlier, we will begin process redesign.
- And we will continue to build a strong and committed organization. We need to increase and improve our organizational capabilities, with an emphasis on developing leadership skills, making sure that we have the right people in the right positions, and that they are leaders rather than managers.

IX. Perspective

- With our momentum and with our enthusiasm for this new year, I think one of the things we need to guard against is becoming overconfident. Remember that nothing fails like success. As Harvey so often says, if you practice a set of skills successfully and long enough, you will groove yourself right into a rut. We have to be willing to invent the company that will put us out of business -- or someone else will. And I know you're going to be hearing from David on this critical issue.
- We need to think about our business in new ways. Rapid advances in information management and technology are turning entities that historically

have been our allies into some of our most formidable competitors. I'm thinking here of the airline industry in particular.

- But as we identify new ways to maximize shareholder and customer value, particularly in Establishment Services, we need to guard against creating new silos. The fact is, there is no SE business without the Card business and there is no Card business without SE. The two are inter-dependent.

- Our ability to maintain and increase our discount rate depends on our ability to deliver on the Promise of the American Express Brand So we want to develop new revenue streams, but in the context of strengthening both our consumer and Corporate Card businesses.

X. MAKING THE COMMITMENT TO MEET THE CHALLENGE

- Let me just close by making a few comments. I don't think the issue is our strategy. I don't think the issue is our tactics. I don't think the issue is the management. I think at the end of the day, what I hear from our shareholder constituency is, can we execute.

- Our competitors today are not coming up with better ideas than us. Our key competitors are more nimble, more flexible, more anticipatory and responsive to the marketplace than we are. That's part of what we have to change in a major way in our reengineering and our mindset turnaround.

- We are going to have to commit, and commitment means you've got to do it with your heart and your

mind and your soul if you're going to be a real winner.

- At the end of the day, most people don't want to win. They wish they could win, but they don't want to win. They are not willing to make the sacrifices. And that is a personal decision that you have to make.
- I think this company has the attributes, I think our employees have the attributes. You are a great group of individuals. I'm very, very proud to be associated with this group. But you've got to make the personal choice if you want to win.
- I think that we're built to last. But let me be clear: it's not enough to survive anymore. We've got to win.

Thank you.

[3226]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

United States of America
States of Arizona, Connecticut, Idaho, Illinois, Iowa, Maryland, Michigan, Missouri, Montana, Nebraska, New Hampshire, Ohio, Rhode Island, Tennessee, Texas, Utah, and Vermont

Plaintiffs

-against-

10-cv-4496 (NGG) (RER)
U.S. Courthouse
Brooklyn, N.Y.

American Express Company, et al.

Defendants

July 24, 2014
9:00 a.m.

Before:

HONORABLE NICHOLAS G. GARAUFIS
United States District Judge

* * *

[Testimony of Bradford W. Morgan (Visa)]

[3316] THE WITNESS: There we go.

BY MR. HAMER:

Q Do you have it there?

A Yeah, just a second.

Q So you state, "So while the bankcard associations have been pursuing cost reductions, efficiencies and lower pricing, American Express has been pursuing higher pricing to fund the creation and aggressive

marketing of product and service advantages." Do you see that?

A Yes.

Q And the next page, 880, you talk about the American Express merchant discount. This is the first full paragraph. Do you have that?

A Which full paragraph? "Key American Express"?

Q Yes. You talk about, "The key American Express vulnerability is their merchant discount. American Express is currently charging a discount of about 3.25 percent versus 1.75 percent for bankcards." Was that right at the time?

A Yes.

Q If you'd go to page 881 in your presentation. You noted to the Visa board that, "There is fairly good merchant awareness that there are more Visa cards out there than [3317] American Express cards. However, they may not be aware of the numbers."

A Yes.

Q A little farther down, you note that, "The merchant community also has not been told well enough that American Express's image of superiority among upscale cardholders is a myth." Do you see that?

A Yes.

Q If you go to page 882, you talk about part of your recommended strategy for Visa. Do you see the section in the paragraph that begins "First"?

A Yes.

Q You say, "First we need to do a better job of telling the Visa story to merchants. This should be done

through an effective trade advertising campaign and through direct communications. And part of those direct communications come from the merchant relations group which we are now organizing." And that was your group, right?

A Yes.

Q And was the focus of this effort to inform merchants about the price difference between American Express and Visa acceptance?

[3318] A It was to communicate everything about Visa and how it compared with its competitors, if they possibly could. It was not intended to focus purely on price.

Q Okay. And was part of the goal to help improve Visa's image among merchants and compete?

A Yes.

Q Okay. So once you made these presentations then, did you move forward with the strategy to do outreach to merchants?

A Once we had the merchant relations group formed, we did. I guess I should also point out that several members of the merchant relations department were working in non-T&E fields where Visa had limited acceptance and were really focused on getting greater acceptance in different parts of the overall market.

Q Okay. So are you familiar with the profit improvement calculator profit wheel?

A Yes.

Q And what was that?

A That was -- it started out as an idea of one of the guys working for me who had wanted to do a circular

wheel like you'll see in a paper wheel, cardboard wheels where a merchant could line up the difference between the fee they were paying to Visa and the fee they were paying to American Express. Put that against their annual American Express [3319] sales volume, and in the bottom window it would disclose here's how much additional profit you could get a year if you could transfer those sales from American Express to Visa.

Q Okay. Is that something that you innovated at Visa?

A The person, the guy who worked for me, Tom Edwards came up with the idea of the wheel. Tom was the only guy I had working in the T&E business. He was not going to be able to drop that wheel off at a lot of places. So I liked the idea a lot, but then I realized that I needed something where I could get the overall story out there without relying on a person to deliver it. So I wrote the copy on the profit wheel.

Q So if we can turn in your binder to Exhibit PX-0082. This is the Visa profit improvement calculator.

MR. HAMER: Plaintiffs offer 0082 into evidence.

MR. BRENNER: No objection.

THE COURT: All right. PX-0082 is received in evidence.

MR. HAMER: Thank you.

(Government Exhibit PX-0082 received in evidence.)

BY MR. HAMER:

Q Mr. Morgan, is this a copy of the profit improvement calculator you were just describing?

A Yes, it is.

[3320] Q What was the message that you're trying to convey to merchants when you distributed this?

A I was trying to primarily show them that they could indeed improve their profits by shifting more volume towards Visa. And I was trying very hard to say that some of the things that you believe about American Express aren't really true and here's the whole set of facts. So a merchant could look at it and say -- instead of thinking, you know, I can only get this kind of a business with an American Express card, I was trying to give them the facts that, no, those same people have Visa cards in their wallets.

Q And at the time, were a lot of merchants displaying signage that was shifting volume to American Express cards?

A Within T&E for sure. Again, they had the blue terminals at the point of sale. They had the check presenters. They had the tip trays. They had the "Take Ones." You saw an awful lot of American Express if you went into a T&E merchant. The most you might see of Visa at that point was usually a sign on the door that says Visa, MasterCard, Discover.

Q And what were the reactions of merchants to your profit wheel?

A Very positive.

Q And after it was distributed, did you learn whether it [3321] helped shift share from more expensive American Express cards to less expensive Visa cards?

A Yes. Shortly after we started distributing the profit wheel, a restaurant owner in Boston decided to get vocal about not accepting American Express or not

liking American Express, I can't remember which. And there was a picture taken of him holding a butcher knife with an American Express card secured on the end of it. And it appeared very prominently in a Boston newspaper, *The Globe* or whatever.

Q Was that the "Boston Fee Party"?

A That's what we jokingly referred to it as afterwards. For some reason, it got a lot of publicity and that picture and the story was picked up fairly broadly. From that point on, the whole ball got rolling.

Q The "Boston Fee Party" was something that was orchestrated by Visa?

A Not at all.

Q Was it an example of merchants expressing the higher rates of American Express cards?

A I believe that was the case.

Q Okay. So we've talked about the "We Prefer Visa" campaign a moment ago. Was that something that was one of your innovations?

A I was certainly a part of it. As this thing got rolling, we were looking for, again, ways we could help the [3322] merchant to act on this and shift business away from American Express and towards Visa. And I think – my recollection is that when my T&E guy was either meeting with Vail or whether they contacted him, Vail Resorts indicated they would like to work with Visa on a promotional basis. And the phrasing and the idea "We Prefer Visa" came out of that, as I recall.

And we liked the idea and realized we could use it again more broadly than just having one guy going around and selling it. So we began the "We Prefer Visa" campaign.

Q Okay. Did it involve an express statement by the merchant that they preferred Visa as their payment form?

A Yeah. We provided signage and decals and other pieces of promotion material to say "We Prefer Visa." And we hoped that the merchants would train people at the point of sale to specifically ask for a Visa card.

Q Did you determine whether it was successful in shifting share from your competitors?

A The first one at Vail was very successful, as I recall. I'm not sure I've got the exact number for you, 45, 50 percent, something like that.

Q Let's look at a document if you can turn in your binder, Mr. Morgan, to PX-0133. This is a Merchant Relations Fact Sheet.

A Okay.

* * *

[3409] time at Visa, there were bylaws which prevented Visa member institutions from issuing American Express card products, correct?

A Yes, yes.

Q These are the so-called exclusionary rules, right? You're not familiar. These were the rules that were at issue in some of the cases where you were deposed previously. Do you remember that?

A You know, I've been deposed for, what, the last eight years or ten years about stuff that happened 21 years ago.

Q Well, we can take notice of what that is. It's fine.

A Show me documents from the deposition. That might refresh my memory. But as I sit here today, no.

Q It doesn't matter. We'll move on. Just to make sure I understand the landscape, though, about what existed when you were there, on the merchant side, this "We Prefer" campaign was among the initiatives that you had -- that you hoped would weaken American Express's financial engine, I think is how you put it.

A Yes.

Q And keep AMEX as a niche product, I think were the words you used, correct?

A Right.

Q At the same time during your tenure at Visa on the consumer side, on the issuing side, Visa had these bylaws in [3410] place that limited American Express's ability to partner with banks to issue American Express cards, right?

A Yes.

Q So you had this "We Prefer" campaign on the merchant side and on the issuing side there were these bylaws, correct?

A Yes.

Q Now, you discussed with Mr. Hamer these new contracts you say came out in 1992, right?

A Yes.

Q New American Express contracts. And you looked in particular at a document that's been admitted as PX-84. It might be DX-7426 in my binder, but it's been received into evidence as PX-84.

A What's the number in this one?

Q This is the Hong Kong document. Why don't you look at DX-7426.

A Okay. I have it.

Q And if you look at Bates 556 of this document.

A Okay. I have that page.

Q And I think it was the Court asked you a question about what your understanding was about these bullets and these restrictions in these bullets and the extent to which the limitations on what merchants could do as described here did or did not exist prior to this point in time.

* * *

[3810]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
STATES OF ARIZONA, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, OHIO, RHODE ISLAND, TENNEESSEE, TEXAS, UTAH, AND VERMONT

Plaintiffs,

-against-

10-cv-4496 (NGG)
United States Courthouse
Brooklyn, New York

AMERICAN EXPRESS COMPANY, ET AL.

Defendants.

Tuesday, July 29, 2014
9:00 a.m.

TRANSCRIPT OF CIVIL CAUSE FOR BENCH TRIAL BEFORE THE HONORABLE NICHOLAS G. GARAUFIS
UNITED STATES DISTRICT JUDGE

* * *

[Testimony of Professor Michael L. Katz]

[3821] Did the department ask you to consider whether the anti-steering rules adversely affect competition?

A Yes, it did.

Q And did you reach conclusions about whether they do?

A Yes.

Q And please tell the Court the principal conclusion that you reached.

A So my central conclusion is that the anti-steering rules harm competition and consumers, and consumers in this case means merchants and their customers.

Q Can you explain how the anti-steering rules harm competition?

A Well, fundamentally, I think a way to see it is ask what would happen if a credit and chargecard network was thinking about lowering its prices to merchants. Now, the reason it might do that is it would expect to get additional business, right. That would be the reward for lowering its prices would be the additional business.

Now, in the absence of anti-steering rules, what you'd expect to have happen is that some merchants would say well, now that this is cheaper for us, let's steer our customers, let's encourage them to use the cheaper credit card network and that would be the reward for lowering the prices, but in the presence of the anti-steering rules, the merchants are limited from doing that. So there's less substitution [3822] towards the network that's lowered its prices. Therefore there's less of a reward for lowering prices, there's less of an incentive to do it, so it's dampening or thwarting competition. It's taking away the award for competing harder.

Q Can you give me an example?

A Yes. As we'll see in a few minutes, the Discover network is an example of that where they had a

strategy where they were going to be lower-priced than other networks. That was predicated in part on merchants steering their customers to Discover, and when Discover learned that that wasn't going to happen because of anti-steering rules, Discover changed its strategy and stopped trying to be particularly low-priced to merchants.

Q Did you also consider whether the anti-steering rules have procompetitive effects?

A Yes, I did.

Q And what conclusion did you reach about the procompetitive effects?

A I considered several different theories, but I considered that when you sort of looked at the facts of them, that none of them generated significant procompetitive benefits and that none outweighed the harms I found earlier.

Q Before we talk about the rules further, did you prepare a slide deck that will help us walk through your analysis?

A Yes, I did.

* * *

[3827] recent years American Express, a blue line appropriately enough, the blue line is showing that American Express is now the second largest credit card network, followed by MasterCard, and then significantly smaller than that is Discover.

So one thing to note is there are only four competitors and three of them are much larger than the other one, and so that's going to raise questions about just how competitive this industry is.

Q So that dip that occurs in 2008/2009, what's that?

A That's the Great Recession.

Q Next slide, please.

Did you identify other key characteristics of the industry?

A Yes. A central feature of this industry is the credit card networks are two-sided platforms, which is to say that they're middlemen between merchants and their customers, and what this diagram is doing is showing you that while the network is the middleman, there are also other parties involved.

Q All right. And what do these boxes labeled "issuer" and "acquirer" represent?

A So you can see the network is in the middle and I've shown in parentheses underneath an example of the network of course would be Visa, as we were just saying. If you're a [3828] customer, a cardholder, you don't deal directly with Visa. You deal with the bank that issues your credit or chargecard, in this case the example is Citibank. So card issuers are just what the name suggests: they issue cards to the customer, they manage the customer relationship and the billing, and they serve as an intermediary between the network and the customer.

The acquirer is doing the same thing for the merchant, and First Data is one of the largest, probably the largest acquirer, and so they service the bank for the merchant and they serve as the liaison between the merchant and the network.

Q What functions do networks perform as middlemen?

A So the most fundamental function they provide is to have a set of protocols and procedures and standards that allow all these parts to work together. They also do things like they run communications networks to let them go together. Then in a different vein the important thing is they do branding. You know, Visa is one of the best known brands in the world. American Express is certainly a well-known and respected brand. They also set prices and they also set rules such as the anti-steering rules.

Q Why do you say a network is two-sided, the platform is two-sided?

A Because its business is to bring together two different [3829] sides. Its business ultimately is to facilitate transactions between merchants on one side and their customers on the other.

Q Who are the consumers of network services in this diagram?

A Both merchants and customers are consumers of the network services.

Q So you're saying merchants are consumers?

A Yes, for these purposes. And that's one thing, again I'll try to be consistent in my terminology and say customers, but I'm sure at some point I will slip into also using the term "consumer" to mean households and individuals, but for the technical economic purposes, merchants are consumers.

Q You've written about network effects.

What do network effects mean in the context of this industry?

A So a network effect generally is when the more people consume a good or service, the more valuable it is to consume it. The classic example being the telephone network, that the reason you have a phone is so you can call other people.

Well, in this industry the way it works is, think about it from the customer's perspective, why have a credit and chargecard is so you can use it, and for you, the more merchants there are on a particular network, the more valuable that network is. So that's a positive network effect where

* * *

[3834] A No, the network doesn't, and that's an important thing to understand in thinking about the pricing in this industry. It's basically something you can think of as being passed through by the network where it's -- think ultimately how the money is going, it's passed through by the network from the merchant side, from the acquirer to the issuer.

Q Can we have the next slide, please?

Summing up, what are the key features of the credit card industry that we should remember as we talk more about it today?

A So as we just saw, there's a small number of networks. We want to keep that in mind in assessing competition. It's going to be really important to think about the fact that merchants and their customers are jointly deciding which payment instruments to use. In fact, I mean that's what steering is all about is the interaction between the two sides in order to make that joint decision. And then the other thing to do is that the principal reason that merchants accept credit and chargecards is because that's what

customers want because in terms of cost, merchants generally find credit and chargecards to be one of the most expensive or the most expensive payment instrument to accept and in general the reason they're doing is because that's what their customers want.

Q Can we have the next slide, please?

* * *

[3836] in much more detail, is value recapture by American Express which is a set of targeted price increases, and the point I'd like to make here is that the anti-steering rules resulted in value recapture being more profitable than it otherwise would have. So there was less pressure to hold price down than there would have been absent the rules.

Q Let's go over all three of those one at a time.

Can we have the next slide, please?

What happened with Discover?

A What happened? Well, the first thing is Discover entered the market in 1985, mid-'80s, and going along for several years and then what started to happen -- first of all, I should say what their strategy was. They wanted to come in and they saw themselves as offering something that offered particular value to merchants. They had although for the merchants a low-price strategy, but as the quotation on this slide is emphasizing, they also did things to be attractive to cardholders and they were pioneers in cash back rewards and, as I said, things like no annual fees. So they came in and that was their strategy.

Okay, then if we could turn to the next slide. What happens, so they had -- they came in with that strategy, and then in the late '90s, what was happening is Visa and MasterCard started raising the rates to merchants, and American Express at the time already had higher charges to [3837] merchants, and so what's being captured in this long quotation, which I will spare you my reading of, is that Discover saw this as an opportunity, because what they saw happened is, okay, everybody else is getting more expensive, we're not going to follow them up as they do that and this will be our chance to gain share.

Q All right. Can we look at the next slide, please?

A Okay. And as you see, because that was from, that quotation was from a speech in 1999, I put this next slide up just to show, and I apologize it's hard to read, but this is the best copy I could get a hold of. Remember that speech was in 1999, so it's on the left side of this diagram and it's just to show that indeed MasterCard and Visa were raising their rates. The speech mentioned there had been a price increase in the previous year and the year after that, and in fact as you see, they were going up at that time.

Q So the bottom two lines on this chart are the MasterCard and Visa rates; is that right?

A That's correct, and then what it's showing on the vertical axis is their discount rates.

THE COURT: Is this a public document?

MR. CONRATH: This was I think confidentiality had not been claimed on this slide, as I understand it.

Is that right?

THE COURT: That's fine. I'm just checking. Go [3838] ahead.

BY MR. CONRATH:

Q Next slide, please.

A Okay. So what happened, as I said, is the prices were going up to merchants, and Discover saw this as an opportunity and so what they did is they reached out to merchants. The earlier quotation was from a speech doing that. The excerpt here is from a letter that was sent out to merchants and pointing out to them, look, they have -- it says the response to Visa and MasterCard, but it's referring to their having increased their prices. It says look, we want to work with you, you know, here's ways to do it. And it's just one thing to note here that this is just as an example of it, it says we've enclosed signs to display at the point of sale. But fundamentally, the strategy was to get merchants to steer their customers to Discover and then that would be Discover's competitive reward, if you will, for having given the merchants a good deal.

Q The next slide, please.

Was this strategy successful?

A No, it wasn't.

Q And explain what's on this slide about why that strategy was not successful.

A So what we've identified here is that a central reason it wasn't successful is, as I say, it was predicated on the [3839] merchants were going to -- Discover thought they would have this better deal for merchants, merchants would steer their customers to Discover, Discover would gain sales, gain market

share. Didn't happen. They didn't see much of a response, as this quotation of earlier testimony in this trial is describing. They didn't see much of a response, and when they looked into why, when they talked to merchants, the merchants said well, we can't steer because we're blocked by anti-steering rules.

Q So what did Discover do with its low-priced strategy when it realized that merchants couldn't steer to it?

A It moved to a different strategy and it's moved to a strategy much more of pricing similarly to Visa and MasterCard, which we'll see on the next slide.

MR. CONRATH: Could we switch the monitor at this point in time?

A Okay.

THE COURT: Go ahead.

Q So now if we could have the next slide.

A As some of us can see, so again, I don't think it -- well, maybe it's in the old days they didn't have very good technology for copying this. Again, I apologize, it's hard to read the slide, but if you look along the bottom, I think this part is not confidential, you see it's broken out into the low cost provider strategy and when they say closed competitor gap [3840] and then the breakpoint between those is 1999 which is when that speech was made and when this initiative occurred, and so what was happening is Discover had been going along, and I describe this in general terms, their prices had dipped and come back some, but then when they saw that that initiative didn't work out at that breakpoint, you see they then just

steadily increased their prices to merchants following that because that's when they abandoned the strategy of trying to be a particularly low-priced network to merchants.

Q So what has been the effect on merchants and customers as a result of Discover abandoning its low price strategy?

A Well, so as a result of that, merchants are paying higher prices for the use of Discover cards and presuming for the use of other credit and chargecards as well because now there's less pressure on the pricing there, and then that means that an economically rational merchant is going to pass those higher costs on to its customers, and even though it may be difficult for anybody to perceive that because it's a small amount for any one customer, that adds up ultimately to substantial amounts of money. So customers ultimately are paying more at the merchants and that includes people who use credit and chargecards, but it also includes people who don't use them.

Q So is it your opinion that the impeding of Discover's low-cost strategy by the anti-steering rules adversely [3841] affected competition?

A Yes.

I just want to be clear about one thing. When I say -- when you say the rules, the anti-steering rules were in effect at the time. So were the MasterCard and Visa rules. So my testimony is that those rules at this time collectively did it, but it's also certainly my conclusion that had it been the anti-steering rules of American Express, the rules, been in place by themselves, they would have had this effect.

Q Next slide, please.

And this is public, Your Honor.

(The above-referred to exhibit was published.)

Q Do you think that Discover would use steering strategies in the future if the anti-steering rules were lifted?

A Yes. At trial earlier, Mr. Hochschild from Discover testified to that extent and that's what this quotation is showing. It said that if merchants could steer, that Discover would return to having this price strategy of lower prices to merchants in order to give the merchants incentives to steer and certainly Discover would hope to get them incremental volume which would make the lower prices profitable.

Q And is that consistent with economic principles?

A Yes, it is.

Q In what way?

A It's really in a sense he's saying – he's saying what I

* * *

[3844] Q Would you consider the "We prefer Visa" preference campaign to be a form of competition on the merits?

A Yes.

Q And can you explain why? What was the effect on merchants and consumers?

A Well, again because what it's doing is they're saying, well, even if they don't offer any incremental rewards to the merchant, what it's saying to the merchant is we'll work with you to steer customers to

what's the cheaper way of paying things. So there's a benefit right there. The other thing is there's benefits when the -- when the network, benefits to the merchants if the networks compete to have that preference relationship and they offer various financial incentives to the merchants.

Q Are you aware of an instance when MasterCard had a preference campaign with Travelocity?

A Yes, you said they had a preference relationship with them, yes.

Q Can we turn to the next slide, please?

What conclusion do you draw from the information that's on this slide?

A Well, the first box, the one on the left, and this is again from trial testimony earlier this month from MasterCard executive where she was saying that they had this preference relationship with Travelocity and then after pressure from [3845] American Express they ended it, and the MasterCard executive indicated that then it had less of an effect, that they were less successful at shifting share and that the campaign was degraded. And so again it's saying it's a lessening of competitive pressure here as a result of this.

Q And is it consistent with economic principles, can you in light of economic principles evaluate whether it's likely that MasterCard would conduct similar campaigns in the future if anti-steering rules were lifted?

A Well, I mean, certainly they would have, as a general matter, they would have the incentive to do that, see a way, and in fact they've indicated in

testimony, right, that they would be interested in doing it and that if their rivals did it, that that would put competitive pressure on them.

Q So is it your understanding that the anti-steering rules, to the extent they impede preference campaigns, adversely affect competition?

A Yes.

Q Next slide, please.

Professor Katz, the third item you mentioned under actual anticompetitive effects was value recapture.

What is value or was value recapture?

A So it was a set of -- it was a pricing and set of pricing initiatives by American Express where it raised its prices to targeted merchant segments.

[3846] Q And what is the connection between value recapture and the anti-steering rules?

A Well, as was alluded to briefly earlier, the anti-steering rules resulted in the charge volume or the demand for American Express's services being less responsive to the merchant discount, and when demand is less responsive to the price, in this case less responsive to the price charged to the merchant, that results in the profit maximizing price being higher. So that means, in this case, the American Express with the anti-steering rules in place has a higher profit-maximizing price, so it's telling us that had the anti-steering rules not been in place, American Express would have faced greater competitor pressures or greater downward pressures on its pricing that would have moderated the price increases.

MR. CONRATH: Could we switch the monitor, Your Honor, before we go to the next slide?

(Pause.)

Q All right. Next slide, please.

Professor Katz, did American Express assess the profitability of its value recapture of price increases?

A Yes, it did.

Q And did they do it separately for unmanaged and for managed merchants?

A Yes.

* * *

[3850] value recapture was profitable.

Q And that's this particular element of value recapture, that amount on this slide?

A That's right, this particular one, and then if you look more broadly for managed merchants that they generally found that few, if any, dropped and I didn't see any concern with incremental suppression.

Q So in sum, how does Amex's ability to implement value recapture relate to the anti-steering rules?

A Well, had there not been anti-steering rules, one would have expected to see the managed merchants engage in incremental suppression and then American Express would have had to take that into account and when they asked themselves the question is it worth it to raise prices or will we lose too much business, there would have been another source of substitution away from American Express that would have been another source of competitive pressure to hold prices down.

Q All right. Could we switch the monitor again, Your Honor?

THE COURT: Public?

MR. CONRATH: Yes, to public.

(The above-referred to exhibit was published.)

MR. CONRATH: And can we have the next slide before we do? I'm sorry, I got that backwards. I apologize, Your Honor.

[3851] Q So looking at this next slide, is it -- could merchant steering have been used to respond to the value recapture of price increases?

A I mean, certainly it could have in principle and we would have expected it to have an effect, and what this slide is showing is that earlier at trial, an executive from Southwest is testifying that in fact had they had the chance to do it, they would have tried to use steering to, as he said, mitigate the price hike that they were getting from American Express.

Q And could merchant steering be used in the future if there were price increases if merchant steering were allowed?

A Certainly.

Q Next slide, please.

What do you conclude, Professor Katz, from these three instances of steering and price increases about the impact of American Express's anti-steering rules on competition?

A So the bottom line is that the anti-steering rules harm competition on the merits and they do so substantially, and we saw that with Discover where

one of the factors when they were abandoning this strategy of being particularly low-priced to merchants in the face of the -- of anti-steering rules; saw it in the case of the preference campaigns and preference relationships that these things can -- that such relationships can be effective in moving share and that they can create and [3852] do create competitive pressures and pressures to respond by competing on the merits; and lastly, value recapture is illustrating just sort of the detailed mechanism by which steering takes away one of the avenues of competition.

Q So you've told us that the anti-steering rules lead to higher prices to merchants.

Could the higher prices affect prices to cardholders on the other side of the platform?

A Yes, they could.

Q And in what way?

A Well, remember these are two-sided platforms. So we need to keep track of what's going on on the other side of the platform, see how these interact, and when -- when merchants are being charged higher prices, that can give the credit and chargecard networks incentives to then give lower prices to the cardholders. Think about it in terms of rewards because when we start talking about negative prices, at least I get confused.

So it works this way. If I'm charging the merchants more, gives me incentives to give bigger rewards to my customers. Why am I doing that? Well, because the higher rewards are going to get them to use their cards more, and since I'm charging the merchant more money, every time I succeed in getting my

customer to use the card more, I'm getting more money. So economic principles will tell us that [3853] if the networks are charging higher prices to merchants, some of that's going to get passed on to the cardholders.

Q So does American Express pass through all of the merchant discount that it collects to cardholders?

A No, they don't.

Q Next slide, please.

How do you know that?

A Well, one thing is American Express says so. This is a statement by their CFO, I guess this is an investor call or investor conference. I apologize, I can't remember which. But anyway, it's a statement by their CFO pointing out that they pass some of it on, but that they, as it says, part of it we drop to the bottom line, which of course there's nothing wrong with that, they're in the business to make money, but it is a fact they keep it.

It's also true if you look at data for their rewards expenses, that's something that there's some dispute among the economic experts in this case on the exact numbers, but I think there's no disagreement that rewards payments are well less than half of the discount rates, significantly less, and it's certainly my view that if you look at, and my conclusion, if you look at value recapture that when American Express raised the prices they were charging the merchants, they did not pass that through to cardholders.

Q What does economic theory tell us about whether a [3854] network's higher prices to merchants resulting

from anti-steering rules would be passed through to cardholders?

A So your question's bringing up is one of the things that when we talk about higher prices to merchants and what the effects are on cardholders, it depends in part on why the prices are higher and if the prices are higher as we're talking about here because the merchants' ability to respond has gone down. So one side of the market now is less responsive to price, that's why the price is going up to merchants, economic theory says the networks are going to keep some of that for themselves. They're not going to pass it all through because they're taking advantage of the fact that demand is less responsive to price, and so there's a clear prediction that that's what will happen. That in this particular case, there will be less than a hundred percent passthrough, and as I said, in fact the evidence indicates, there's less than a hundred percent passthrough.

Q So you've said that American Express does not pass through a hundred percent of the merchant fees to cardholders.

Assume that it were true that a hundred percent of the higher prices caused by the anti-steering rules were passed through to Amex cardholders, does that mean that merchants and their customers are not harmed?

And I think we need the next slide here.

A No, it doesn't. If you think about it, what this slide [3855] is summarizing is that the anti-steering rules are going to raise merchants' costs, okay, first off for the reasons we talked about that there's less competition among credit and chargecard networks

and also even taking the prices as given, even ignoring that aspect of generally raising charges to merchants, you've also got the thing that the rules stop merchants from pointing or steering their customers to cheaper chargecards or cheaper credit cards, okay, and those two effects then are going to result in the merchants having higher costs of accepting appointments and then they're going to -- an economically rational merchant is going to pass that on to its customers.

Now, exactly which ones it passes it on to depends on how much it engages in any sort of targeted discounting or charging different prices for different payment instruments, but generally merchants are charging the same price for everything. So what's going to happen is prices are going to go up with the merchant for everybody, including people who are not using American Express cards, and those customers are going to be worse off.

So for example, if you're somebody who is going into a merchant and you always pay with cash or you always pay with a debit card, you're going to be paying higher prices and the fact that some or all of the credit card users are getting rewards is not going to help you.

* * *

[3957] of insistence is getting at if I'm a merchant and I accept American Express cards, I'm going to have some volume of business that uses them and if I stop taking American Express cards, I'm going to lose some of that business, and insistence is a measure of how much I'm going to lose.

Q And what's the relevance of insistence to your evaluation of whether American Express has market power?

A Well, insistence is a key source of market power because it's explaining why it is that merchants are willing to pay more for American Express.

Q And I should say here is insistence your term, or did you pick it up from American Express?

A I've certainly used the word before, but using it as a term in talking about insistence and insistence value, that's from American Express documents.

Q Could we have the next slide, please?

MR. CONRATH: And this is confidential, sorry. Are we still on confidential mode?

THE COURT: Yes, we are.

Q How does the concept of insistence enter into American Express's pricing to merchants?

A Well, what this document is showing is how American Express thinks about what insistence means for its pricing. So as part of how it evaluates things. And what the document is doing is it's starting with the baseline value and what [3958] that baseline value, as you see in 1 how they're interpreting it, they're saying, well, what does it cost the merchant to accept Visa and MasterCard's credit cards because Visa and MasterCard credit cards are their big, that's their competitor.

So then they're saying, well, so we could charge that amount because, you know, we go back and think about in terms of the logic of the slides with the green and the red boxes. If we just charge the same

amount as Visa and MasterCard, then there's not going to be a rate differential. So the merchant's not going to have an incentive to want to move away from us because they'll say look, we're the same price and Visa and MasterCard, why would the merchant care which one is used.

All right. So then they ask themselves, they said, well, we'll start from that baseline of our competitors and now let's take into account insistence, and what's shown here, and maybe we could highlight it in red, what they do is they're asking the same question of the merchant: How much are you going to lose, okay, if you stop taking American Express? And so they calculate this insistence value, if we could do the next callout, and they break insistence down into two parts. The CM is for cardmember. They're saying look, there's walk-away insistence, the people aren't going to shop with you so you're going to lose the business, and then the [3959] other callout is what they call the spend less, which even if they continue to shop with you, they're not going to spend as much money. And so what the boxes above that are doing is saying we're figuring out then how much money is that worth to the merchant, right, given that they know that the merchant would lose business by not accepting us, American Express, so how much more can we charge than MasterCard and Visa are charging for their credit cards, and this is again is charging to the merchant. So that's what those amounts are saying is this is how much more that we can charge.

Then the rest of the diagram is showing things or ways American Express creates value other ways. And then if you go to 4 they're showing certain things

with operational costs for merchants, they're saying, you know, these policy, their policy driven costs for merchants, and again that gets back to this question that the issue for merchant, it's not just about what it pays for a payment instrument or what it pays for a credit and chargecard. There are also other costs associated with it.

So they very much look at insistence as something to think about when evaluating their pricing because it's giving a sense of what sort of premium they can charge over their competitors Visa and MasterCard and for it still to be rational for a merchant to accept it.

And now if you go to sort of the tall white box on [3960] the right side next to the black box, what they've done there when they say the value surplus and they say when we put all the pieces together and the biggest components of that value surplus are the insistence numbers, when we put all those pieces together, that's how much we're worth to the merchant than MasterCard and Visa. That's really the language I was talking about before, that's what you're going to lose because of the insistence and some other factors if you don't take us.

And then what they're doing in the black box is their labeling. If you look at that dashed line, the bid above says well, this is how much we charge today, the part above that dashed line, this is how much we charge today and this is showing, and this is just an illustrative example as it shows here, it's saying our value to the merchants that we get from switching to other things is bigger than the premium we are charging. So what this is showing though is that American Express recognizes insistence is one of the

things that gives them the ability to charge merchants higher prices.

THE COURT: But they don't charge the full value surplus?

THE WITNESS: No, they generally don't.

THE COURT: According to them.

THE WITNESS: And I agree with that and we will come to that, Your Honor, we'll look at some specific calculations by industries that this is clearly something they use as part [3961] of an overall process, but they're not literally going up to these numbers because as we'll see in some cases the numbers are very high, we'll see when we get to them, but they're very high numbers, but what it's doing is it's identifying the source of the ability to charge higher prices and then giving a sense that there's a lot of room for them to charge the higher prices, but, you know, American Express does bargain with their merchants, so merchants are getting surplus too and, you know, why I'm going to focus on here's why they can charge merchants more, of course there are things offsetting that and what we're looking at really is the balance and that's why they're not going to get all of that surplus, some of that is going to go to merchants. But the point that I take away from my economic analysis though is there is a bunch of surplus there and which is translating into the ability to charge higher prices.

MR. CONRATH: I probably should have mentioned, by the way, Your Honor, that you might recognize this document and one very much like it that Mr. Funda talked about earlier in the trial.

BY MR. CONRATH:

Q And can I just ask you one thing, Professor Katz.

That baseline cost, the starting point on this calculation is Visa and MasterCard credit; is that right?

A Yes, that's what it says.

* * *

[3985] to market power; is that correct?

A That's correct.

Q Can you explain what value recapture shows, about whether American Express has substantial market power?

A So as we were discussing earlier today, they had -- value recapture was a targeted -- set of targeted price increases, and it illustrates my conclusion. It illustrates the successful exercise of market power. American Express was starting from prices that were not below the competitive levels. They were prices -- they were being charged in a concentrated industry with other firms have been found to have market power, that were being -- the prices were in the presence of the anti-steering rules, which certainly my conclusion, further elevated the prices. I think there's no assertion by anyone that they're actually lowering the prices.

The procompetitive benefits don't have to do with that. We're starting from a level where the prices are at or above competitive level and we're raising those. And when we see what happened is they increased the prices on the merchant side. They were not offsetting changes on the cardholders' side, so that the net price, if you will, the two-sided price, increased, and that those two-sided price increases

were profitable. They both raised revenues and they raised profits.

MR. CONRATH: Could we look at the next -- can we [3986] change the monitor and then look at the next slide? Sorry, your Honor. Okay. Next slide.

Q Professor Katz, is this an example of value recapture?

A This is showing the discount rates American Express is charging to the top ten airlines plus another airline category over the period starting before value recapture and running through. And if you look at that, if you look, for example, at the top line, Delta, I won't call out the numbers, but you'll see between the start of the period and the end, there was a significant increase in the discount rate charged to Delta. And if you go down the list, comparing them, you'll see that with the exception of Air France that all of them went up, and that American Express instituted price increases for the top nine airlines.

MR. CONRATH: Could we take a look at the next slide, please?

Q What does this next slide show?

A Well, surprisingly, American Express valuated the profitability of what they were doing, and what this slide is showing is the results of one of their analyses, where they were looking to assess how it had done. And what this is doing is identifying the effects of the program on their revenues and on their average discount rate. And as you can see, in the one number that's circled in the red ellipse, it's saying that their U.S. weighted average discount rate went up [3987] by that number.

And the other thing they're doing is they've identified the total benefits or the cumulative benefits of these different initiatives, because the way this chart is working is that box shown for 2006 is the incremental PTI they got from the 2006 initiative. And then the box next to it, the white box, if you go over to 2007, is saying what were the affects of those 2006 initiatives when we continued those through to 2007. And then that's why that box carries over to the other years, including the forecast. And then that black box, if you look at 2007, that's on top of, then that's the value of the 2007 initiatives that then carry across, and that's why the later years have more boxes.

And they concluded -- and they were projecting that the total amount of that would be that number shown circled in red, where it says "incremental pretax income," although I should note that in deposition testimony that they're saying that that's more of a revenue change, and there were some offsets, which we will talk about, but, as we'll see, the offsets were far below that number.

MR. CONRATH: Can we take a look at the next slide, please?

Q So what does this next slide show?

A So this is one we looked at before, and as an example, but just generally illustrating the point that almost no [3988] managed merchants dropped, so American Express didn't suffer from attrition from doing this, and that they generally gained from doing it. Although, as mentioned in the title of this slide, it's not that this -- that they just automatically did everything they wanted to, they did in some cases

have to give incremental marketing funds to merchants, so that was a bit of a concession.

But if we turn to the next slide, we'll see -- this is a slide, an American Express internal document again -- that they concluded -- as we can see the pop up, they concluded that the revenue benefit they got from this, from having value recapture, in their words, was substantially larger than the advertising promotion, so substantially larger than the marketing funds that they had to give to merchants. So they concluded that these price increases from profitable for managed merchants. And this is one document, but there are others that reached the same conclusion, and their executives have said that they found it overall was profitable.

Q All right. That was managed merchants, the large ones. Did you also look at unmanaged merchants?

MR. CONRATH: And can we have the next slide?

A Yes, American Express did look at it. And, again, this is the slide we saw earlier this morning, coming back to look at more detail, where now we have in that first call-out is [3989] the revenue benefit that they saw from the deal. Earlier this morning, we talked about the offset from incremental cancellations, and you can now see them together in perspective, that the cost of the incremental cancellations was far below the revenue benefits they saw themselves getting.

And, then, as we discussed earlier, they weren't sure exactly what the suppression rate was, the incremental suppression, when it triggered. But they said that they were reasonably confident they were below that, so that their estimate was value

recapture was also profitable to the unmanaged merchants as well.

Q So when thinking about market power, is America Express' value recapture program evidence of American Express having market power in the relevant markets?

A Yes, it's evidence of their exercising it, because they did these price increases in both T and E markets but also non-T and E markets. They raised the prices certainly no lower than competitive levels, and they did to profitably. In fact, one of the things that's notable is they're saying that their revenues went up. Typically what you would expect to see happen when a firm raises its prices is the revenues might fall but its costs would fall further, and that's why you might do it. Here, they're saying there was so little response -- at least with managed merchants, there was so [3990] little response we raised the price. Revenues went up even before we had to get any benefit from saving -- normally what would happen if you raised your price, it would lower the volume, and then you would have some cost savings.

Q Is what that what would happen in a competitive market?

A Well, what in most markets you would expect that to happen. So you might say, well, we've raised their price; maybe our revenues have gone down a little bit, but our costs have fallen by even more. Here, what they're saying is when they raised the price, it actually raised their revenue, which is somewhat unusual for firms. I think it's further evidence that they had market power.

MR. CONRATH: If we can turn to the next slide, this one can be public, your Honor.

Q Can you summarize for us, Professor Katz?

A All right. So what this slide is doing is just – we were looking at it before lunch and just talked about now that -- look at the different pieces of evidence speaking to whether American Express possesses market power in the two relevant markets, that in each case the market structure is one that is concentrated, that American Express has a significant market share; the entry is difficult, and that supports a finding that American Express has market power.

Then, in both markets, American Express has insisting cardholders. Not every cardholder is going to [3991] insist on using American Express but substantial percentages will, and, therefore, it's quite costly for a merchant faced with such cardholders to cease accepting American Express. Again, that doesn't mean every merchant will accept them; there are other considerations, clearly, but it does mean, particularly, for the large merchants, that it's a costly decision for them to drop.

And, then, finally, as we've just been talking about after lunch, American Express' prizing strategy itself provides evidence that their premium pricing supports a finding they have market power. The fact that they engage in extensive price discrimination is consistent with having market power, and you have to have some market power to do it. And then value recapture is an example of successful exercise of market power.

MR. CONRATH: Next slide, please.

Q So now that you've identified American Express as having market power, what's the next step under the approach that we're following here?

A So remember the steps, we're at define markets, assess whether American Express had market power within it, and then the third step is to identify whether anticompetitive effects are likely, given the findings in the earlier stage about the scope of the relevant market and America Express' market power within that market.

* * *

[4011] Travelocity, and said, yes, it still had some beneficial effects but they were weaker, and so --

THE COURT: They went from being the preferred card to the official card.

THE WITNESS: That's right. And they said the effects of that – they're weaker. Just as there are other exceptions, there's exceptions for co-brand cards. But in all these cases, it's still limiting the overall degree steering. In this case of co-brand card, it's special cases. In terms of these preference campaigns, holding them short term, people in the industry have said the short term ones are less effective. They can not very effective during that short term but then they drop off after that.

And so there are exceptions, and those exceptions then do allow some of the competitive steering, but at the same time they're also limiting it. And one way to say it is there's no such thing as saying, well, there's enough competition. Always have more competition, and more competition would be better.

MR. CONRATH: Could we -- what does the second role on this slide mean?

THE WITNESS: So the second bullet is speaking to, again, my understanding of what American Express is saying, which is through their experts and through their executives, saying if they didn't have the rules, they wouldn't be able to [4012] maintain their differentiated strategy, which clearly is valuable, very valuable with some cardholders. And their experts have said, well, in the absence of these rules, what a merchant's going to do is just whatever is the cheapest network, they're going to push their customers into using that. And then a network such as ours, that comes in and offers a lot of value to cardholders is not going to be able to survive.

My conclusion is that that's not a valid argument, because it's ignoring merchants' incentive. An economically rational merchant, first off, is going to look at the quality of the network from the merchants' perspective, so if American Express or another network can differentiate itself by offering particular value to the merchant, the merchant will take that into account, and that's something that could offset a higher price.

But the other thing is the merchant takes its Customers' preferences into account. If merchants didn't care about their customers' preferences and just took whatever's cheapest, we would see no merchants in America except in credit and charge cards. All the merchants would just take debit cards, for example, because they're cheaper. The reasons merchants take credit and charge cards, even though they're more expensive, is precisely because the merchants care about their customers' preferences.

[4013] So if American Express generates significant value for its cardholders and can generate -- and it doesn't cost them more money to generate the value than the value itself, then they would be able to survive, because the merchants will want to accept American Express cards because their customers will want to use them. And I think that's, in fact, why Mr. Funda was saying this thing that one response to getting rid of the rule could be to increase cardholder benefits, in order to make those cardholders more attractive or more insistent, really, so that then merchants will continue to take American Express.

So my bottom line conclusion on that is if American Express is truly creating value through its differentiated strategy, then it will be able to compete successfully in a world where steering is possible, because this is the world that most business firms live in. It's manufacturers selling to retailers. Retailers are steering their customers all the time. When you walk into a store, they make suggestions to you which brands to use. If you go into super market, there are end-of-aisle displays. They can have special prices discounting. Most manufacturers live in a world with steering, and we certainly see manufacturers that successfully have premium products, not just premium pricing, premium quality to go with it. So I think there's no basis for concluding that these rules are essential to protecting [4014] American Express' differentiating model. The differentiating model can stand on its own.

Q Professor Katz, we've gone over several possible justifications for the merchant restraints, the anti-steering rules. Could you sum up your conclusions

about whether there is a procompetitive justification that warrants the anti-steering rules?

A My conclusion is that there is not, is that the rules do harm competition and consumers, where again, consumers means both merchants and their customers, and there's not an offsetting procompetitive justification.

MR. CONRATH: All right. Thank you. I have no further questions, your Honor.

THE COURT: Very well. Cross-examination.

MR. CONRATH: Mr. Chesler points out something to me, that I may have misspoken, that -- of course, obviously, are -- the chart 100 is not one of the surveys that Professor Ford testified about, it's a consumer survey. Professor Ford testified about the merchant survey. It's a different survey from the same source, but it was not one of the ones he testified --

THE COURT: The two exhibits you identified.

MR. CONRATH: Yes may we admit them?

THE COURT: 2703, which is the professor's CV and 2702, which is the slide presentation.

* * *

[4017] Q But you, in fact, agree with America Express' experts that American Express operates in one or more two-sided markets, don't you?

A Yes, you can view it that way.

Q I understand you can view it that way, but I'm asking if you view it that way?

A As I've indicated, I believe it can be viewed two different ways. You can view them as being -- you can have one two-sided market, or you can talk about two one-sided markets as long as you keep track of those two markets and how they interact.

MR. CHESLER: Your Honor, I'm told we need to switch the feed to our side of the courtroom.

THE COURT: Well, that's fine. I just didn't think you'd put anything up yet.

MR. CHESLER: No, I haven't.

THE COURT: Thank you for your efficient staff.

MR. CHESLER: Was that a compliment, your Honor?

THE COURT: No further comment. You're all doing an excellent job.

Q Professor, we put two books up there. One is your deposition in this case, deposition in some other litigation and your reports. That's volume one. Volume two are individual documents that -- some of which I will ask you to look at during the course of the cross-examination. So I'd [4018] like you to look in the first volume at your deposition in this case. And that's right up front in the book. And I'd like you to look at page 14, and I asked you, at line five, would you agree that American Express in conducting its business operating in one or more two-sided markets, and you said yes?

A Yes.

Q And I take it you agree with that?

A That's why I said just a few minutes ago that that's one way of viewing it, and I thought the other one

was appropriate as well, but, yes, I agreed this is a way to do it both then and now.

Q And, in fact, you agree with Professor Burnheim, and Professor Gilbert and Professor Hay that not only does American Express operate in one or more two-sided markets, but that an assessment of market definition, market power and competitive effects should account for the two-sided nature of the market, correct?

A Yes.

Q I'd like you to look in the second volume at Defendants' Exhibit 1917. They should be in number order. I hope they are.

A Yes.

Q I hope my efficient staff has put them in number order. You recognize 1917 as a presentation that you made in April of

* * *

[4037] that as an insult but if you'd just repeat the question.

Q Why don't we, so there isn't any failure of communication, why don't you look at paragraph 157 of your report which is the 7183, that is page 70. It should be the excerpt in your book.

A I'm sorry, would you repeat the paragraph number?

Q 157, it is at the top of page 70 and you'll see, I think I was reading it accurately, you say:

In summary, as a matter of economic theory, even if one knew that a proposed merger would increase some measure of network market power, it does not

follow either that interchange fees would rise or that even if interchange fees did rise, merchant or consumer welfare levels would fall as a result.

It goes on to say: It is critical not to draw unwarranted and misleading conclusions by focusing solely on one side of a two-sided market.

I take it you agree that you made that statement in that case, sir?

A I agree I made it and I agree with the statement.

Q Thank you.

Now, I believe that one of the markets that you say you defined for purposes of this case is the market for network services provided to merchants, correct?

A That's correct.

* * *

[4112]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
STATES OF ARIZONA, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, OHIO, RHODE ISLAND, TENNESSEE, TEXAS, UTAH, AND VERMONT,

Plaintiffs,

-against-

10-cv-4496 (NGG)
United States Courthouse
Brooklyn, New York

AMERICAN EXPRESS COMPANY, ET AL.,

Defendants.

Wednesday, July 30, 2014
9:00 a.m.

TRANSCRIPT OF CIVIL CAUSE FOR BENCH TRIAL BEFORE THE HONORABLE NICHOLAS G. GARAUFIS
UNITED STATES DISTRICT JUDGE

* * *

[Testimony of Professor Michael L. Katz]

[4163] Honor?

A I don't recall saying that, but that's -- I agree with the statement.

Q All right. Let's look at your deposition, which is the first tab in Volume 1, transcript page 231.

A I'm sorry, you said page 231?

Q Yes, sir, I did.

A Thank you.

Q You have that page, sir?

A Yes.

Q All right. And I'd draw your attention to line 7 on 231 of your deposition. My question: "So far as you're aware, what factors tend to create an enhanced brand loyalty in the credit card industry?

"Answer: If a consumer thinks that he or she is, you know, getting particularly high value from using a particular card, I would expect that that consumer would be more loyal to that card in the sense of preferring to use it, and as long as that consumer continued to have good experiences with the card provider and with using, it would remain a user and I would call that being loyal.

"Question: Could that value, for example, come in the form of rewards?

"Answer: Yes."

And then your testimony goes on.

[4164] MR. CONRATH: Your Honor, I object to not reading the complete answer.

THE COURT: Yeah, read the rest of the answer, please.

MR. CHESLER: Okay.

Q "I should also state though since we brought up this issue about marketing, there are people who would say that's not evidence of loyalty at all, somewhat the way a friend of mine once said that dogs are loyal and he said they're loyal only as long

as you're feeding them. So that's why there's a debate in marketing about what we mean by loyalty. So that's why single-homing is not necessarily equivalent to the concept."

And then I asked you: "Well, to use your dog analogy might be analogous to they are loyal so long as they keep getting the rewards?

"Answer: Yes."

Do you recall giving that testimony, sir?

A I certainly remember the dog testimony, yes.

Q And do you stand by the dog, sir?

A As long as he doesn't bite me, yes.

Q Thank you.

And you would also agree, would you not, that there are no significant barriers that face issuers from offering rewards programs similar to American Express's?

* * *

[4172] transactions that would be charged at higher discount rates to merchants, didn't he?

A I'd have to recall specifically. I believe his testimony, as I sit here my recollection is he said that interchange rates would be driven up so that merchants would be paying more and that more money would be paid to the issuers' side than the consumers'. I think it was about interchange, but I'd have to go back and look.

Q All right. I think we're in agreement on that.

Now, you responded, part of your role was to respond to Professor Pindyck, wasn't it?

A Well, my role was to analyze, you know, the economic issues in the case, and certainly I took into account what he said and I responded where I thought he, you know, he either had a good point or a bad point, yes.

Q And one of the things you responded to Professor Pindyck about was you said that his focus on discount rates was unsound, didn't you?

A I think if we're talk -- yes, if we're talking about interchange, his focus exclusively on discount rates is unsound, yes.

Q And you testified that by focusing solely on one dimension of a multidimensional competitive behavior, he was providing an incomplete, and thus misleading, picture of economic effects.

[4173] Wasn't that your testimony, sir?

A Yes.

Q And you said that merchant and consumer welfare has to be measured in terms of the total package of benefits that they receive, not just the merchant discount rate, correct?

A So because this was in your opening statement, I actually had -- this is something I had gone back and looked at. So I want to just clarify a couple of things.

One, the consumer there is meaning consumer in the everyday use of the word. So that's why it's in -- it's what I would have said in current terminology as merchant and customer, but yes, I said it was about both of them. And that that statement was saying you have to look not just at price, but also at quality.

MR. CONRATH: Could I object to the fact that apparently the witness read Mr. Chesler's opening statement but not mine?

THE COURT: When you get his bill, you can adjust.

MR. CONRATH: I am delighted that he saved the time that would have been wasted reading my opening.

MR. CHESLER: I'm not good at taking --

THE COURT: I'm very impressed, Mr. Chesler, about the fact that the witness is so familiar with your work.

THE WITNESS: Not as familiar as he is with mine.

THE COURT: Apparently so.

* * *

[4175] outcome, for example, the Wal-Mart litigation and other factors, but yes, merchant discount rates did go up in the years following that litigation.

Q And the interchange, I think we've established, is by far the largest component of the merchant fee in the card industry, correct?

A Yes.

Q And one of the things that you emphasized in First Data, moving from Visa to First Data.

A Thank you.

Q One of the things you emphasized in First Data was that it was very important to acknowledge that increased interchange fees which the government was saying would occur in the presence of that merger were in fact passed back to consumers both

directly in rewards and indirectly in the overall services that issuers provide to consumers, correct?

A I don't recall saying the second part, but I would certainly agree with the -- that economic analysis, and I do recall the first part.

Q And to sum up this point, your view in First Data was that because of the two-sided interrelated nature of the market, it was incorrect to think that the effects of interchange fees on consumer welfare can be understood by looking solely at the merchant side of the market?

A Yes.

* * *

[4177] A Yes.

Q And that in a two-sided market, interchange rates can and have been driven up by an increase in competition, correct?

A Now, so you're now asking generically?

Q Yes. I'm quoting from your First Data testimony, but I quoted it exactly you gave it "in a two-sided market."

A Yes, I agree with that statement.

Q Thank you.

Now, is it similarly true, sir, that if interchange rates were to be lowered, that can harm consumers through the resulting effects on card issuers' pricing and service quality?

A Yes.

Q And can an increase in interchange rates also increase merchant welfare as well as consumer welfare?

A In theory, yes.

Q For example, an increase in interchange could provide incentives for issuers to offer card features like rewards that encourage consumers to use their cards with the merchants and that can benefit the merchants, correct?

A Depending on what the payment alternatives are, it could be the case, yes.

Q I just want to ask you a bit about the but-for world that you considered in connection with this case.

A The present case.

* * *

[4185] about one-fifth of American Express's, correct?

A That's correct, that's my recollection.

Q And so I take it the math would demonstrate that although there are more people walking around, apparently, with Discover cards in their wallets, or at least available to them, and more merchants where they could use them, they're spending much less on the cards, correct, than they are on American Express cards?

A That's right, American Express has a much higher spend per card.

Q And you would infer from that that American Express has somehow managed to provide a more compelling value proposition to the people that have its card than Discover has, wouldn't you?

A No, I would infer from that that American Express has put forth a value proposition that appeals to people who purchase a lot on their cards. In fact, I think Discover's value proposition is viewed very favorably by the people who hold Discover cards, but those people have different characteristics than the -- you know, on average, I'm sure there's some overlap, but on average the people who hold Discover cards have different spend characteristics than the people who hold American Express cards.

Q Now, staying just for one more minute with this but-for world with respect to this case.

[4186] You testified before that it's possible that merchant fees would go up, right?

A Following this case, yes.

Q And in fact, your view is that although they may go up, that we should just let the chips fall where they may. Isn't that your view, sir?

A If the chips are falling where they may as a result of increased competition, yes, that is my view.

Q So if all of the merchants who came in here, merchant after merchant after merchant, and said "my rates are too high, they need to come down" and if Mr. Conrath in his opening said "if we win this case, merchant rates will come down," and if it turns out that your proposition that they may go up turns out to be correct that's fine would you?

A It would depend on why they went up, but if the reason they went up is competition, that would be fine with me. There's certainly other reasons that they could go up that I would say they're not fine with me, by which I mean in conducting an antitrust

non-economic analysis I would find that there is a problem.

Q Thank you. Let me move to a different subject.

You agree, do you not, that many agreements between vertically-related parties can have procompetitive effects?

A Yes.

Q And in fact, a vertical restraint is not necessarily

* * *

[4193] A Yes, I would agree with that.

Q And you would also agree that the vast majority of American Express cardholders also have Visa and/or MasterCards, correct?

A Yes.

Q But the vast majority of Visa and/or MasterCard cardholders do not have American Express cards, correct?

A I believe that's correct.

Q So Visa and MasterCard could enter into agreements under a decree with the government and pay merchants to steer consumers, for example who show up with their American Express Card, to steer to Visa and MasterCard, correct?

A Yes.

Q Now, if American Express were governed by those rules and it were to pay merchants to steer to American Express from Visa or MasterCard, that would only work if the Visa or MasterCard consumer at the counter actually have an American Express Card in her wallet, correct?

A In terms of steering from that to American Express, yes.

Q And you recall that I also asked you whether in the but-for world that you considered here, if American Express found itself in a situation in which it had an accepting merchant that was actively steering its cardholders, cardmembers away to a competing card, American Express could not terminate those relationships and decide to walk away

* * *

[4258] Q So is it your -- let me ask you this, your analogy was that if you keep feeding the dog, the dog remains loyal; that's an analogy to rewards, so my question to you is can insistence driven by continuing spending on rewards be a source of market power?

A Yes. I mean, it's a source of market -- as my conclusion, it's a source of market power for American Express. It's also a key source of market power for Visa. And I think there's agreement among economic experts on Visa having market power; and I believe if you look to see the basis of that, there will have to be agreement that it's being driven by the loyalty or insistence of Visa cardholders.

Take a nonpayment industry example, and it will be an old one, because I'm going to talk about newspapers when they had market power, but newspapers are also an example of the two-sided platform because they bring together the advertisers with the viewers and subscribers. And it's recognized in the past that newspapers could have substantial market power with respect to advertisers, and the way they got that market power is by attracting readers, which meant continually having to invest in

providing content that the readers found attractive and, therefore, wanted to be in the newspaper.

So it's the same mechanism, that you're attracting the subscriber, and then that brings you the advertisers. And [4259] in the case of newspapers, again, before the rise of the Internet, they often had substantial market power against advertisers on the other side of the platform.

Q Do you recall some questions about Amex bringing competition on the issuing side during the *U.S. V Visa* time frame?

A Yes.

Q So going back to that point, Visa and MasterCard were owned by the banks that had a lot of overlap between themselves; is that right?

A Yes.

Q And since then there's been *U.S. V Visa*, the court decision, right?

A Yes.

Q And there have been IPOs with Visa and MasterCard, so that they no longer have the same overlap of ownership that they had before?

A They have changed their corporate structure, so instead of being associations, they're now corporations, but I have not examined the ownership under this new corporate structure.

Q Bank issuers today do compete with each other even if the bank issuers are on the same network; is that right?

A Yes, that's true.

Q And did you happen to -- in your reading for the Court's homework assignment of Mr. Silverman's testimony, did you [4260] happen to see his testimony about the fact that competition among -- the proposition that competition among issuers has driven up rewards amongst a wide variety of issuers?

A I'm not sure I recall the specific testimony. Certainly the -- I read a bunch of his testimony having to do with rewards and competing by offering attractive rewards.

Q Is it true today that different issuers of cards, not just American Express, but lots of different issuers of cards are competing with each other to provide the most attractive rewards for consumers in order to attract cardholders?

A They're certainly competing by offering what they hope cardholders will consider to be attractive rewards, in order to attract their business, yes.

Q Even if it were true 15 years ago that American Express was bringing a unique form of attraction for cardholders in the form of rewards, today there are lots of issuers who are bringing competition to attract cardholders through rewards and other programs?

A There was competition among issuers then there's competition now, yes.

Q Does the -- so -- the fact that there's competition on the issuing side, does that mean that competition on the merchants side is something that is unimportant?

A No.

Q Could you explain why not?

[4261] A Well, the prices, the profits and consumer welfare, the two-sided platform, are going to depend on what's happening on both sides of the platform. And competition on the merchant side of the platform is going to be an important part in determining that overall outcome.

THE COURT: Mr. Conrath, I think this may be a good time to break for lunch.

MR. CONRATH: Sure.

THE COURT: After lunch, we have about an hour left?

MR. CONRATH: Probably about that, your Honor.

THE COURT: All right. And you anticipate that you have very much on recross, at this point?

MR. CHESLER: Not so far, your Honor.

THE COURT: And so after Professor Katz' testimony is completed, we'll take a ten-minute break, and then you'll call your next witness after that.

MR. CHESLER: Our first witness, your Honor. We had several in their case.

THE COURT: I know that. I wasn't going to correct you, though, because I think I've done enough of that already.

MR. CHESLER: As far as I'm concerned, your Honor, that's where we are.

THE COURT: That's good. We'll take an hour for lunch. Thank you.

MR. CHESLER: Thank you, your Honor.

* * *

[4270] to say when you were answering that, you were answering it in the if sense and you were not agreeing that Mr. Chesler had correctly characterized the government's position, isn't that right?

A That is correct.

Q Could you turn to DX 6507 which is your -- or maybe your second report, if you prefer that volume.

If you would turn in DX 6507 to paragraph 148 please on page 78. Do you recall Mr. Chesler read you portions of the first paragraph and perhaps the second to the proposition that American Express is an important competitive check on the exercise of market power by MasterCard and Visa; do you recall that discussion?

A Yeah, my recollection is that he read paragraph 148.

Q Could you turn the page please to paragraph 150, and I think this was not read to you but I'd like to have it also in the record and ask you if this is also your opinion:

The fact that competition from American Express has important consumer benefits does not give American Express a free pass to engage in anti-competitive actions on the grounds that those actions benefit American Express. Indeed, this fact has the opposite implication. Weakening American Express alone would be sufficient to have significant harmful effects on competition and consumers, then it follows that weakening competition among all credit and charge card networks, which [4271] is the effect of American Express's merchant restraints, will harm consumers by even more."

Did I read that correctly?

A Yes.

Q And is that an important corollary to the opinion you expressed in paragraph 148?

A Yes, I stand by the opinion, I guess you could say it's a corollary.

Q Do you remember some discussion with counsel for American Express around the question of whether merchants are able to determine what a particular Visa or MasterCard type of card costs when it's presented?

A Yes.

Q I'd like to ask you some questions about that in relation to economic principles. Is it correct that it could be of value to merchants to be able to determine how much a particular Visa or MasterCard costs if the merchants could use that information to steer customers?

A Yes.

Q All else equal, if merchants have no ability to steer, there would be little reason for merchants to invest in technology that would allow them to determine the costs of a particular Visa or MasterCard, isn't that correct?

A Yes, if you're saying as part of that did they know what the average cost is, yes, because they would just have to

* * *

[4276] here is to your expert report in U.S. v. First Data; is that right?

A That's correct.

Q Could we look at your expert report in U.S. v. First Data which is DX 7183.

A I'm guessing it is volume one.

Q Yes, I think so.

A I'm sorry, could repeat the number please.

Q DX 7183. I'd like to ask you to direct your attention to paragraph 156 in DX 7183.

A Yes.

Q So, if you look at that, the relevant sentence that's quoted there in paragraph 156 of DX 7183, were you in fact talking about discount rates in that paragraph?

A No, what I said in the paragraph, both places where the word "discount" appears in square brackets I was talking about the interchange rate.

Q All right. Can you clarify for us whether it makes a difference whether one is referring to an interchange rate or a discount rate?

A It makes a huge difference for these purposes because with an interchange rate, which is what I was talking about in my report, by definition it is a pass-through the network passes through, so that when the interchange rate goes up, the merchant is paying more and the cardholder side of the market [4277] is paying less. That's what the interchange is doing, it is a transfer from one side to the other. It is impossible to raise the interchange to the merchant without then having an equal and offsetting effect of interchange on the other side because that's the definition of interchange is a payment from one side

to the other. And so, what I was testifying to in the First Data case is saying, well, it doesn't make sense to say here's what happens when you raise to one side and simultaneously lower to the other side and look only at the one side.

Now, in talking about a merchant discount, it's certainly correct, the interchange is the biggest portion but there are other pieces and because of those other pieces such as the network fees it certainly is possible to raise the merchant discount without affecting the price on the other side, whereas that's a logical impossibility in the case of changing just the interchange rate. So, it is a very significant difference, it is just a different meaning.

Q And so, your criticism in the expert report in the First Data case, your criticism of Professor Ordover who was at that point the government's witness, was that the theory of raising interchange rates inherently involved evaluation or a rate that had affected both sides of the market; is that right?

A Yes, the interchange inherently affects both sides and therefore you should take that into account when assessing the [4278] effects of a change in the interchange rate.

Q In this case is your theory that the harm caused would be a raise in interchange rates?

A It is my testimony that as a result of the harm to competition which then reduces the sensitivity to price on the merchant side but that that will raise what the networks will keep but I also anticipate that that would have an effect on the interchange as well by affecting the balance.

Q So, your testimony is that if the merchant discount rates go up, have gone up as a result of the reduction in competition, some of that stays with the network and doesn't pass through to the other side, is that right?

A That's correct.

Q And all of the many quotations that you were read concerning First Data were in the context of your criticizing Professor Ordover for a theory that was about interchange rates only; is that right.

A That's my recollection as I sit here. I was read several quotations but that's my recollection.

Q Do you recall being asked some questions about the U-shaped charts, the charts that showed usage of credit and debit at a variety of retailers that we didn't -- whose names we didn't mention?

A Yes.

Q And you also looked at some variations of those charts

* * *

[6619]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
STATES OF ARIZONA, CONNECTICUT,
IDAHO, ILLINOIS, IOWA, MARYLAND,
MICHIGAN, MISSOURI, MONTANA, NEBRASKA,
NEW HAMPSHIRE, OHIO, RHODE ISLAND,
TENNESSEE, TEXAS, UTAH, AND VERMONT,

Plaintiffs,

against-

AMERICAN EXPRESS COMPANY, ET AL.

Defendants.

10-CV-4496 (NGG) (RER)

United States Courthouse
Brooklyn, New York

Monday, August 18, 2014
9:30 a.m.

TRANSCRIPT OF CIVIL CAUSE FOR BENCH
TRIAL BEFORE THE HONORABLE
NICHOLAS G. GARAUFIS
UNITED STATES DISTRICT JUDGE

* * *

[Testimony of Professor Michael L. Katz]

[6664] A Yes, I did.

Q All right. Is one flaw his treatment of Continental Airlines' exit from American Express's rewards program?

A Yeah, because what I found is there was some problems on the other side -- well, it is not the other side of the equation but the other components in terms of the rewards liability and how he interpreted that and one of those problems was with the treatment of Continental.

Q All right. Could you turn to the next page of your exhibits, Slide 8 of PX 2778.

A I have it in front of me.

Q So, first of all, what does it mean to say that Continental exited the Membership Rewards program, American Express's Membership Rewards program?

A So, my understanding is that Continental announced that they would be leaving American Express's Membership Rewards program, which is to say that American Express cardholders enrolled in Membership Rewards after the date of their exit would no longer be able to redeem their rewards to travel on Continental and that people were given some warning that that was coming.

Q All right. What did that announcement and that change do to the value of American Express's Membership Rewards program?

A Well, for people who wanted to redeem miles on [6665] Continental, it lowered them because in the future you wouldn't be able to do it at all and you might also want to just rush to do it now, maybe travel earlier than you wanted to, but it reduced it.

Q All right. And what do you see in your Slide 8, the question and answer from Mr. Funda there?

A Mr. Funda is making this same point, he didn't elaborate the way I did, but that it is making the program worse from the point of view of the cardholder.

Q All right. So, if Continental's exit, impending exit from the program made the program worse from the perspective of American Express cardholders, what impact should that change have had on a correct calculation of American Express's two-sided price?

A Well, we need to step back for a second because there's a subtly in calculating two-sided price in this way, because we're talking about customers here who are getting rewards, right. It's not -- we talked about them facing a negative price because you get rewarded when you travel but you're not literally being told, well, the price is minus, you know, 25 cents or whatever, you're getting something of value. And so, when the value of what you're getting goes up, we've heard that's equivalent to a price decrease. That's the concept of the two-sided price, we've got to offset what's happening on the cardholder side. So, when the value of the rewards goes [6666] up, that's equivalent to a price decrease but it also follows the other way, that when the value of rewards goes down, as it has here, that corresponds to a price increase.

So, looking at the effects of Continental's exit, it was equivalent to an increase in American Express's two-sided price.

Q So, did Dr. Bernheim's methodology calculate that American Express's two-sided price increased or went up because of Continental's impending exit from the Membership Rewards program?

A No. His methodology, which focused on the rewards liability and the accounting system, wouldn't pick up this effect at all, it doesn't look at the value to the cardholders and, in fact, as it turned out in Continental, the way he did -- the way he did it, not only did he miss this but it actually did exactly the opposite.

Q All right. Could you please turn to PX 2644 in your binder.

MR. CONRATH: Your Honor, PX 2644 is an e-mail from Katherine Kwan. This is an American Express e-mail dated Thursday, February 17th, 2011, to a large group of people, and the subject is U.S. MR, Membership Rewards, review 2011 zero plus 12F.

And it says: Attached is a summary of the final version of the U.S. MR 2011 zero plus 12 forecast and then

* * *

GUIDE TO TRIAL TRANSCRIPT

[illegible]	[illegible]	[illegible]
Kevin Thiel (Alaska Airlines)	July 7 July 8	181-288 310-372
John Robinson (Ikea)	July 8	373-464
George Satkowski (Enterprise)	July 8	466-534
Denis Bouchard (Sears)	July 9	547-617
Joseph Quagliata (Amex)	July 9 July 10 July 14	619-797 997-1113 1128-1218
Roger Hochschild (Discover)	July 10	811-994
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Jeffrey A. Rein (Walgreens)	July 14 July 15	1339-1408 1420-1521
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Prof. Gary T. Ford (Government Expert)	July 16	1768-1895
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Prof. Michael L. Katz (Government Expert)	July 29 July 30 August 18	3815-4105 4117-4288 6626-6745
Ben Mitchell (Official Payments)	August 13	6113-6191

[redacted]	[redacted]	[redacted]
Kenneth Chenault (Amex)	July 30 July 31	4290-4382 4388-4659
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Prof. B. Douglas Bernheim (Amex Expert)	August 13 August 14	6202-6409 6414-6613

No. 16-1454

In the Supreme Court of the United States

STATES OF OHIO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MONTANA, RHODE ISLAND, UTAH, AND VERMONT,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, AND AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS AND RESPONDENTS NEBRASKA, TENNESSEE, AND TEXAS

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor
HANNAH C. WILSON
Deputy Solicitor
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@ohioattorneygeneral.gov

Counsel for Petitioner
State of Ohio

QUESTION PRESENTED

This case asks how Section 1 of the Sherman Act, which bans unreasonable restraints of trade, applies to "two-sided" platforms that unite distinct customer groups. Such platforms are ubiquitous, ranging from eBay (serving buyers and sellers), to newspapers (serving readers and advertisers). Here, credit-card networks bring *cardholder* customers together with *merchant* customers for ordinary transactions. When doing so, Respondents American Express Company and American Express Travel Related Services Company ("Amex") contractually bar *merchant* customers from steering *cardholder* customers to credit cards that charge merchants lower prices. Applying the "rule of reason," the district court held that: (1) the Government proved that Amex's anti-steering provisions were anticompetitive because they stifled competition among credit-card companies for the prices charged to merchants, and (2) Amex failed to establish any procompetitive benefits. The Second Circuit reversed. It held that, to prove that the anti-steering provisions were anticompetitive (and so to transfer the burden of establishing procompetitive benefits to Amex), the Government bore the burden to show *not just* that the provisions had anticompetitive pricing effects on the merchant side, *but also* that those anticompetitive effects outweighed any benefits on the cardholder side. The question presented is:

Under the "rule of reason," did the Government's showing that Amex's anti-steering provisions stifled price competition on the merchant side of the credit-card platform suffice to prove anticompetitive effects and thereby shift to Amex the burden of establishing any procompetitive benefits from the provisions?

PARTIES TO THE PROCEEDINGS

The Petitioners in this Court and the Appellees in the Second Circuit are the States of Ohio, Connecticut, Idaho, Illinois, Iowa, Maryland, Michigan, Montana, Rhode Island, Utah, and Vermont.

The Appellees in the Second Circuit (and Respondents in this Court) also included the United States, and the States of Arizona, Missouri, Nebraska, New Hampshire, Tennessee, and Texas.

The Respondents in this Court and the Appellants in the Second Circuit are American Express Company and American Express Travel Related Services Company, Inc.

In the district court, the State of Hawaii was also originally a plaintiff, and MasterCard International, Inc. and Visa Inc. were also originally defendants.

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JURISDICTION

The Second Circuit entered its judgment on September 26, 2016, and denied en banc review on January 5, 2017. Petitioners received extensions of time to file a petition for certiorari until June 2, 2017. They filed a timely petition on that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 1 of the Sherman Act provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

STATEMENT OF THE CASE

A. Today, Four Companies Dominate The Concentrated Credit-Card Industry

1. Credit cards have evolved for over a century. In the early 1900s, Sears started issuing lines of credit and then store cards to customers for their purchases. David Evans & Richard Schmalensee, *Paying with Plastic* 53 (2d ed. 2005). Department stores and oil companies also began issuing charge cards at this time. *Id.*; Pet. App. 10a n.11.

In the 1950s, the modern industry began to form with cardholders able to use the same card at differ-

ent merchants. Pet. App. 10a. Diners Club, for example, began by enlisting New York restaurants to accept payment via cards issued to restaurant goers. *Id.* "Unlike store cards, Diners Club cards provided a broader medium of exchange—one that extended to at least all the merchants in the club." Evans & Schmalensee, *supra*, at 54. It reimbursed restaurants, but charged them a percentage of the bill. *Id.* It also charged cardholders an annual fee. *Id.*

American Express also introduced a competing card in the 1950s. Pet. App. 11a. It "set its cardholder fee higher than the [Diners] Club cardholder fee and thereby cultivate[d] a prestigious, upscale image of 'exclusiv[ity].'" *Id.* (citation omitted). Both cards "were mainly used for travel and entertainment" rather than for everyday purchases. Evans & Schmalensee, *supra*, at 61. By 1966, American Express had become the volume leader. Pet. App. 12a.

In the 1960s, competing business models emerged. *Id.* The networks that became Visa and MasterCard began "as banking cooperatives that collaborated on a card brand to pool the merchants that individual member banks of the cooperative had signed up on their respective cards." *Id.* Later, in 1985, Sears introduced the Discover Card. Sears gained a foothold by "market[ing] Discover's cards to its already significant population of private label cardholders." *Id.* at 154a & n.24.

2. Today, general purpose credit and charge cards—"credit cards"—are "a principal means by which consumers in the United States purchase goods and services from the nation's millions of merchants." *Id.* at 73a-74a. The industry is "highly con-

centrated" with "four dominant networks": Visa, MasterCard, Discover, and American Express Co. and American Express Travel Related Services Company ("Amex"). *Id.* at 74a, 154a. These four networks account for nearly all U.S. credit-card transactions: Visa (45% share in 2013, as measured by charge volume), Amex (26.4%), MasterCard (23.3%), and Discover (5.3%). *Id.* at 151a.

"Credit cards enable cardholders to make purchases at participating merchants" quickly and easily. *Id.* at 75a. When a cardholder uses the card, "a multitude of economic acts" kick into gear. *Id.* at 5a. The cardholder accesses a credit line. *Id.* The merchant "receives payment quickly—minus a fee." *Id.*

As these exchanges show, credit-card networks serve two consumers—merchants and cardholders. "By facilitating transactions" between those groups, the networks operate what is known as a "two-sided" platform. *Id.* at 77a. "In a two-sided platform, a single firm or collection of firms sells different products or services to two separate yet interrelated groups of customers who, in turn, rely on the platform to intermediate some type of interaction between them." *Id.* These platforms are common in old and new industries: Newspapers unite readers and advertisers; computer operating systems connect application developers and end users. *Id.* The platforms often have "indirect or cross-platform network effects" in that "the number of agents or the quantity of services bought on one side of a two-sided platform affects the value that an agent on the other side of the platform can realize." *Id.* at 79a. A card's value to cardholders, for example, depends on the number of merchants that accept it; its value to merchants likewise

depends on the number of cardholders who use it. *Id.* This phenomenon—a "'chicken and the egg problem'"—creates significant entry barriers. *Id.* at 79a, 154a (citation omitted).

Credit-card platforms must balance the relative prices that they charge the two consumer groups. *Id.* at 80a. Cardholder demand for card use is more price sensitive than merchant demand for card acceptance, so "a network may charge its cardholders a lower fee than it charges merchants." *Id.* at 9a. Indeed, cardholders may "pay a 'negative' price . . . in the form of rewards earned on a per transaction basis." *Id.* at 182a n.36. Such "rewards" may include items like cash back, airline miles, or gift cards. *Id.* at 89a. Merchants, by contrast, must pay "merchant discount fees" to accept credit cards. *Id.* at 83a. Those fees are "a percentage discount rate multiplied by the purchase price" of the transaction (e.g., 2% of a $100 purchase would be $2). *Id.* They are "among many merchants' highest" costs. *Id.* at 221a-22a.

3. The four credit-card companies have different structures. *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 234-36 (2d Cir. 2003). Visa and MasterCard operate open-loop networks "that can involve as many as five distinct actors." Pet. App. 81a. On one side of their platforms, these networks do not themselves issue cards to cardholders. *Id.* at 81a-82a. Instead, "issuers"—mostly banks like Chase or Capital One—sell cards, credit, and rewards to cardholders, and set the terms (such as the interest rates). *Id.* About "20,000 entities compete" for these cardholders. *Visa*, 344 F.3d at 237. On the other side of their platforms, Visa and MasterCard do not interact with merchants. Pet. App. 82a. Instead, "acquirers"—

again, mostly banks—contract with merchants to accept Visa and MasterCard, and reimburse these merchants for credit-card transactions. *Id.*

For Visa and MasterCard, then, "[t]he network's most fundamental function is to establish protocols and procedures by which issuers and acquirers capture, authorize, and settle transactions; they also establish nearly all elements of the price charged to merchants (except for the fee charged by the acquirer/processor)." *Id.* That price consists of the interchange fee (to the issuer bank), the acquirer bank fee, and the credit-card network fee. *Id.* at 83a. Visa and MasterCard (and their issuers) also pursue a "lend-centric" business strategy because they rely "on the interest charged on revolving balances to generate more than half of their revenue." *Id.* at 87a.

Amex, by contrast, operates a vertically integrated "closed-loop" network. *Id.* at 83a. It "acts as the card issuer and merchant acquirer for the vast majority of transactions involving its cards." *Id.* at 83a-84a. It sets both merchant fees and cardholder benefits. *Id.* at 86a, 89a. Under its "spend-centric" model, it charges higher fees (and generates more revenue from them) than the other networks. *Id.* at 86a-89a. It justifies this price premium to merchants by highlighting its affluent cardholders "who generally spend more on an annual and per transaction basis than non-cardholders." *Id.* at 88a. Amex uses some of these fees to fund its cardholder rewards that "encourage cardholders to use their cards for purchases at Amex-accepting merchants." *Id.* at 89a.

The smallest competitor, Discover, has a "hybrid" business model. *Id.* at 86a. It operates its own net-

work and issues its own cards (like Amex), "but relies on third-party acquirers and processors to service the merchant side of the platform" (like Visa and MasterCard). *Id.* Also like Visa and MasterCard, it pursues a "lend-centric" strategy. *Id.* at 87a.

Amex and Discover thus compete for cardholders with the thousands of banks issuing Visa and MasterCard cards. *Id.* at 117a. And the four networks compete for merchant acceptance. *Id.* About "3.4 million merchants at 6.4 million different merchant locations" accept Amex. *Id.* at 184a. Visa, MasterCard, and Discover, by comparison, are accepted at about 3 million more locations. *Id.* at 184a-85a. The "vast majority" of the merchants that make up this coverage gap are "very small." *Id.* at 224a. One report, for example, found that 98 of the top 100 retailers accepted Amex, and that the other two did not accept credit cards. R.590, Stipulation, ¶ 12, PageID#30295.

B. Amex's Merchant Agreements Increase Prices By Barring Merchants From Steering Cardholders To Low-Cost Cards

1. In the late 1980s, Amex gained market share by expanding outside its travel-and-entertainment markets into "everyday spend" markets, like gas stations and grocery stores. Pet. App. 91a. Visa and MasterCard reacted to this expansion into their "bread and butter" territory with both competitive and exclusionary conduct. *Id.* As for the competitive conduct, they began advertising campaigns—like "We Prefer Visa"—that targeted Amex's higher merchant prices. *Id.* at 92a. This succeeded in shifting share because Amex "was, in fact, markedly more

expensive." *Id.* at 201a. As for the exclusionary conduct, Visa and MasterCard barred their issuing banks from issuing Amex or Discover cards. Pet. App. 91a. A district court held that this ban violated Section 1 of the Sherman Act, and the Second Circuit affirmed. *Visa*, 344 F.3d at 240-43.

In response to the preference campaigns, Amex bolstered "its contractual restraints on merchants." Pet. App. 200a. These restraints had existed "in one form or another since the 1950s." *Id.* at 93a. Yet Amex made them stricter and "intensified its efforts to enforce" them. *Id.* Its modern "anti-steering provisions" are the fruit of these efforts. J.A. 99 (standard agreement); J.A. 97-98 (merchant regulations). Under these provisions, merchants that accept Amex may not, among other things, (1) "indicate or imply" a preference for non-Amex cards; (2) "dissuade" customers from using Amex cards; (3) "persuade or prompt" other cards; (4) "impose any restrictions, conditions, disadvantages, or fees" on Amex cards "that are not imposed equally on" other cards; or (5) "promote" other cards (other than private-label cards) "more actively than [they] promote" Amex cards. J.A. 97-98. (Consistent with the Durbin Amendment in the Dodd-Frank law, these rules do not bar merchants from steering toward debit or cash. Pet. App. 20a n.38.)

"In practice," Amex's anti-steering provisions "block Amex-accepting merchants from encouraging their customers to use any credit or charge card other than an American Express card, even where that card is less expensive for the merchant to accept." *Id.* at 100a. A merchant may not, for example, incentivize a less expensive card by: offering a price dis-

count or other monetary incentive (like free shipping); offering a non-monetary incentive (like priority boarding or special check-out lanes); displaying accurate information about the relative costs of various cards; or "in any way signaling that the merchant's retail prices might be lower if it were better able to control its credit card costs." *Id.* at 100a-01a.

Amex's standard agreements bind most merchants to its anti-steering provisions. *Id.* at 94a-95a. While Amex does customize contracts for some merchants, its non-standard contracts also typically "restrict nearly all forms of point-of-sale steering." *Id.* at 97a. Amex "actively monitors" and "vigorously enforces" its anti-steering provisions. *Id.* at 102a-03a.

2. Anti-steering provisions prevent the credit-card market from functioning like a normal market, where "if you reduce your price, you should see increases in volume and gain market share." Tr. 832 (Hochschild/Discover). Once a merchant accepts a network, *cardholders* choose the card to use for a transaction; the anti-steering provisions bar *merchants* from influencing that choice. Pet. App. 195a. With cardholders unaware of merchant costs, the provisions "sever[] the typical link between merchants' demand for network services and the price charged for the same." *Id.* This stifles price competition. As an Amex executive conceded, "I don't think anybody's business strategy is to be cheaper than the next guy." Tr. 2668 (Funda/Amex). That is not for a lack of trying. Discover attempted to become the low-cost option, but its cost-cutting failed because the anti-steering provisions barred merchants from turning its lower prices into greater share. Pet. App.

203a-07a. The result: "higher all-in merchant prices" for *all four* networks. *Id.* at 207a.

Merchants recognize these higher prices. Retailers operating in competitive markets face relentless pressure to cut costs. Tr. 1343-44 (Rein/Walgreens). As a Southwest Airlines executive noted, "[i]f we don't drive our costs down, we can't set our prices; somebody else will do that for us." Tr. 2372 (Priebe/Southwest). To reduce the cost of inputs, a merchant might use a bidding process to gain preferential supplier contracts or leverage purchasing volume "to realize economies of scale." Tr. 381-82 (Robinson/Ikea). Or a merchant might try to reduce its input purchases. Alaska Airlines lowered its fuel consumption by replacing 30-pound flight manuals with iPads, and drilling holes in beverage-cart drawers to reduce weight. Tr. 222 (Thiel/Alaska Airlines).

When it comes to credit-card costs, however, merchants have little control. Pet. App. 198a. A Home Depot executive explained that "[t]here is very little that [it] can do" to prevent increases in those costs. Tr. 1223 (Kimmet/Home Depot). Ikea, too, does not "bid for credit card services," and finds itself "locked into a cost structure that doesn't change." Tr. 382 (Robinson/Ikea). Alaska Airlines does not strategize about how to deal with credit-card costs because it cannot "get the credit card networks to compete on the fees they charge." Tr. 224 (Thiel/Alaska Airlines). Similarly, Hilton was not rewarded with lower rates when it increased its Amex volume; it saw price hikes instead. Tr. 1609 (Brennan/Hilton).

Ultimately, merchants pass on higher credit-card costs to consumers through higher retail prices. Pet.

App. 210a-11a. As a former Walgreens executive noted, "we have to pass [credit-card] costs on to our customers. The customers eventually have to pay." Tr. 1406 (Rein/Walgreens). And because retailers usually charge the same prices no matter what payment a customer uses, customers paying with cheap credit cards subsidize the rewards of high-cost customers. Pet. App. 212a. Conversely, retailers would pass on much of the savings from credit-card competition to consumers, "typically in the form of a price decrease." Tr. 1278 (Kimmet/Home Depot). With steering, merchants could seek preference pricing and "look to return some of those savings to [their] customers." Tr. 2328-29 (Bruno/Crate & Barrel); Tr. 1543-44 (O'Malley/Best Buy).

C. The District Court Found That Amex's Anti-Steering Provisions Harmed Consumers In Violation Of Section 1

The United States and 17 States ("the Government") sued Visa, MasterCard, and Amex, alleging that their anti-steering provisions violated Section 1 of the Sherman Act by impeding *industrywide* competition over merchant prices. Pet. App. 21a-22a.

Before trial, Visa and MasterCard settled by voluntarily rescinding their anti-steering provisions. *Id.* at 22a. Those companies now may not bar merchants from offering discounts or nonmonetary benefits to customers for using particular cards. R.143, Final J., PageID#3338. The companies, however, may enforce rules prohibiting merchants from disparaging their brands. *Id.*, PageID#3340.

Amex went to trial. The court held a seven-week bench trial, which included over 1,000 exhibits, four

expert witnesses, and 34 fact witnesses. Pet. App. 72a. (A witness index is at J.A. 273-75.) The court concluded that the anti-steering provisions violated Section 1. *Id.* at 259a. It noted that Section 1 barred unreasonable restraints, and that the rule of reason typically applied to vertical agreements between entities at different market levels. *Id.* at 105a-06a. Yet the restraints here did "not fit neatly into the standard taxonomy" because, while vertical in nature, they restricted horizontal competition between networks. *Id.* at 106a-07a. The court nevertheless reviewed the restraints under the usual burden-shifting approach: The Government must prove anticompetitive effects, which shifts to Amex the duty to provide procompetitive rationales. *Id.* at 107a-10a.

1. *Relevant Market.* To determine the effects of Amex's restraints, the court defined the relevant market as "the market for general purpose credit and charge card network services" provided to *merchants*. *Id.* at 112a-13a. In doing so, the court rejected Amex's argument that the market should encompass *merchants* and *cardholders*. *Id.* at 116a-18a. It found that the different services provided to the different customers were "separate" products, but conceded "that these markets are inextricably linked." *Id.* at 118a. It also rejected Amex's argument that debit cards fell within the market. *Id.* at 122a-43a.

2. *Anticompetitive Effects.* For two reasons, the district court found that the anti-steering provisions were anticompetitive. *Id.* at 148a. To begin with, Amex had market power. *Id.* at 148a-91a. It accounted for 26.4% of a market with only four players. *Id.* at 151a. The market also contained high entry barriers. *Id.* at 153a-54a. And Amex's "loyal card-

holder base"—who "would shop elsewhere or spend less if unable to use" Amex—allowed it to increase merchant prices without much attrition. *Id.* at 156a-65a. Amex had, in fact, previously raised prices without losing many merchants. *Id.* at 165a-72a.

In addition, Amex's provisions harmed price competition. *Id.* at 191a-228a. They prevented merchants from reacting to price increases by steering cardholders to low-cost cards and shifting share to cost-cutting networks. *Id.* at 195a. And they made it "nearly impossible for a firm to enter the relevant market by offering merchants a low-cost alternative to the existing networks." *Id.* at 203a. The provisions thus enabled *all* four networks to charge higher prices. *Id.* at 210a. Merchants, in turn, passed much "of their additional costs along to their customers in the form of higher retail prices." *Id.* at 210a-11a. While Amex cardholders reaped some rewards in response, those benefits only partially offset the higher prices. *Id.* at 209a. Customers who used cash or cheaper cards subsidized Amex's "relatively small, affluent cardholder base." *Id.* at 212a.

3. *Procompetitive Rationales.* The district court rejected Amex's procompetitive rationales: that its anti-steering provisions preserved its business model, and prevented free-riding. *Id.* at 229a. The court found that the first argument—that Amex's "model could not survive" with competition—conflicted with the Sherman Act. *Id.* at 235a. Amex could not decide "on behalf of the entire market which legitimate forms of interbrand competition should be available and which should not." *Id.* at 240a.

The court also rejected Amex's arguments that its anti-steering provisions stopped "free-riding," i.e., using a benefit without paying for it. *Id.* at 250a-58a. While Amex gave merchants "analytics-based services," it could charge for those services separately. *Id.* at 252a-53a. Amex's rewards program also did not allow for free-riding. "[T]he network does not incur any cost [for rewards] if the cardholder is successfully steered away from" Amex. *Id.* at 256a.

4. *Remedy*. The court entered a permanent injunction. *Id.* at 294a-319a. Under that injunction, Amex could not bar merchants from, among other things, offering discounts for competing cards. Pet. App. 298a-300a. Yet it could prevent merchants from making misleading or disparaging statements about its brand. *Id.* at 302a-03a.

D. The Second Circuit Reversed, Holding That The Government Did Not Establish Any Anticompetitive Effects

The Second Circuit reversed the injunction, and directed a judgment for Amex. *Id.* at 4a. It did not disturb the district court's fact-findings. *Id.* at 24a-53a. Instead, it held that the district court committed three legal errors. *Id.* These perceived errors—all of which were tied to the district court's purported failure to consider the *cardholder* side of the credit-card platform—were said to show that the Government failed to prove anticompetitive harm. *Id.*

First, the Second Circuit held that the district court defined the market too narrowly. *Id.* at 31a-40a. Whereas the district court defined the market as services to *merchants*, the circuit court held that the market must include services to *cardholders*. *Id.*

at 32a. "Separating the two markets," the court said, "allows legitimate competitive activities" to be penalized. *Id.* at 35a. It justified this broad definition because a price increase on merchants might lead merchants to reject the network, which "might cause some cardholders to switch to alternative forms of payment." *Id.* at 39a. For credit-card networks, the panel found, courts "must consider the feedback effects inherent on the platform by accounting for the reduction in cardholders' demand for cards (or card transactions) that would accompany any degree of merchant attrition" from higher prices. *Id.*

Second, the Second Circuit rejected the district court's market-power holding. *Id.* at 40a-48a. The district court focused on Amex's ability to increase merchant prices, but "merchant pricing is only one half of the pertinent equation." *Id.* at 44a. A proper analysis, the circuit court held, required the Government to show that these price increases for merchants were not offset by price decreases for cardholders (in the form of benefits). *Id.* The Second Circuit also deemed the district court's market-power conclusion marred by its reliance on the "insistence" of Amex cardholders to use Amex. *Id.* at 45a-48a. It reasoned that cardholder satisfaction is what "makes it worthwhile for merchants to pay the relatively high fees that Amex charges." *Id.* at 45a-46a.

Third, the Second Circuit rejected the district court's holding that the anti-steering provisions caused actual anticompetitive effects in the form of higher merchant prices, again because it did not account for cardholder rewards. *Id.* at 49a-53a. In the Second Circuit's view, the Government needed to show that merchants *and* cardholders were "worse

off overall." *Id.* at 51a. And while the district court found that higher merchant prices caused higher retail prices for *all consumers*, the Second Circuit held that this finding did not account for the rewards enjoyed by *Amex cardholders*. *Id.* at 49a n.52. "Without evidence of the net price affecting consumers on both sides of the platform," the Second Circuit held, "the District Court could not have properly concluded that a reduction in the merchant-discount fee would benefit the two-sided platform overall." *Id.* at 53a.

SUMMARY OF ARGUMENT

I.A. This Court's cases applying Section 1 have balanced two concerns. To begin with, Section 1 is a "consumer welfare prescription." It assists consumers by protecting *interbrand competition* among firms selling similar products. That competition promotes allocative efficiency (and consumer welfare) because it reduces the prices of products to their marginal costs. It also achieves the best mix of products in terms of their price, quality, service, and the like.

In addition, Section 1's framework must develop in ways that lawyers and businesses can understand, and that judges and juries can apply. These administrative concerns have led the Court to tailor Section 1's rules to a restraint's likely effects. Restraints that will almost always harm consumers are *per se* illegal. And a case-by-case "rule of reason" applies to restraints with unclear effects.

B. These consumer-welfare ends and administrative concerns should also guide analysis *within* the rule of reason. As lower courts have held, that rule initially requires the Government to prove a restraint's anticompetitive effects—i.e., its consumer

harms. The level of proof required should turn on the restraint's potential adverse effects. Likely anticompetitive restraints invite a "quick look." Potentially procompetitive ones demand a more detailed market analysis. If the Government meets this burden, the defendant must then present a procompetitive rationale. For example, restraints may reduce competition in order to achieve productive efficiencies that lower costs. But competitors may not justify a restraint on the ground that it protects inefficient firms from "ruinous competition."

II. Here, the Government met its burden under the rule of reason when it proved that Amex's anti-steering provisions caused *industrywide* increases in merchant prices above levels that would exist if the four networks competed over those prices.

A. Amex's restraints implicate Section 1's primary purpose to protect *interbrand* competition. While Amex's merchant agreements are *vertical* in nature, they have *horizontal* effects because they limit competition among Amex, Visa, MasterCard, and Discover over merchant prices. These restraints thus differ from pure vertical restraints, like resale price maintenance, that limit only *intrabrand* competition. In addition, the credit-card industry is highly concentrated, with significant entry barriers. All of the competitors also used similar restraints before this litigation. That these interbrand restraints blanketed a concentrated industry enhances their risks.

B. Whatever standard of proof applies, the Government met its burden by providing *direct* evidence of the restraints' *actual* effects: higher prices.

Economic Theory. The anti-steering provisions have the potential for adverse effects because they make price unresponsive to demand. Once merchants accept Amex, Amex's restraints bar them from steering customers to low-cost cards. The cardholder *alone* chooses how to pay—without knowledge of the relative costs to merchants. With demand unresponsive to price, networks have no incentive to cut prices because price cuts will not generate higher market share.

History of Restraint. Amex designed its restraints to have these effects. In the 1990s, Amex strengthened its anti-steering provisions in response to its competitors' "preference" campaigns. By encouraging merchant steering, those campaigns were shifting market share to low-cost cards and putting downward pricing pressure on Amex. Amex's restraints allowed it to crush this price competition and halt that share shift without lowering price.

Real-World Effects. By restricting price competition, Amex's restraints have caused *all four* networks to increase their merchant prices. Those restraints facilitated Amex's "Value Recapture" initiatives (that is, its price increases). They also helped Visa and MasterCard increase their merchant fees and reduce the gap between their prices and Amex's traditional premium price. As for Discover, it initially saw an opportunity to become the low-price option given its competitors' price increases. But the anti-steering provisions blocked its price-cutting approach. So Discover changed strategies by charging prices closer to its competitors' higher levels.

III.A. The Second Circuit wrongly required the Government to prove that higher merchant prices were not "offset" by higher cardholder rewards. This mandate conflicts with: the Court's cases, consumer-welfare goals, administrative concerns, and the traditional market-definition test.

Precedent. This Court has held that competition sets the optimal mix of a product's "price" and "nonprice" attributes. Thus, competitors could not justify horizontal agreements raising engineering or dental prices on the ground that this price restriction "channeled" competition into the quality side of those markets. The Second Circuit wrongly held the opposite here, justifying a restraint over price competition on the ground that it "protect[ed]" the "revenue" that Amex used to compete over rewards. But *competition* should set the "optimal" mix of merchant prices and cardholder rewards.

Consumer Welfare. Basic economic theory shows that price restrictions (and higher prices) harm consumers, and that those harms will not be "offset" by other types of competition. A horizontal *price* cartel, for example, incentivizes cartelists to compete over *service*, but those services will not offset the higher prices. Instead, the cartel generates a misallocation of resources, with consumers receiving services that they do not value at their costs. That misallocation arises here. *Amex cardholders* do not value the rewards at their full cost because *all consumers* pay those costs through higher retail prices.

Administration. The Second Circuit's "offset" requirement increases administrative costs. Its inquiry requires "pass-on" calculations that this Court

has rejected in other areas. And the Court should be especially reluctant to place this burden on the Government because Amex seeks to defend a current anticompetitive harm (higher prices) with a conjectural procompetitive benefit (future rewards).

Relevant Market. The Second Circuit's novel market-definition test confirms its error. This Court has long held that two products fall within the same market if a consumer could reasonably switch to one product when the price of the other increased. Under that test, cardholder services and merchant services are not in the same market; merchants could not become cardholders if networks raised merchant prices. These products are complements, not substitutes.

B. In any event, the Government proved that Amex's anti-steering provisions harmed *all* consumers. The district court found that merchants pass on higher merchant prices to retail consumers through higher retail prices. And it found that Amex did *not* pass on to cardholders all of the revenue that it received from these higher prices. Thus, Amex's anti-steering provisions generated a higher "net" price.

ARGUMENT

I. THE RULE OF REASON SHOULD IMPLEMENT SECTION 1'S CONSUMER-WELFARE GOALS IN A WORKABLE WAY

Section 1 bars "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. The Court has never read this text literally, because "restraint is the very essence of every contract." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679,

687-88 (1978). An "agreement" among a business's employees, for example, eliminates competition between them, but cooperation within corporations has never "raise[d] the antitrust dangers that § 1 was designed to police." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984). Instead, the Court has long read Section 1 against the common-law backdrop to bar only *unreasonable* restraints. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59-60 (1911). To decide what is "unreasonable," the Court's tiers of antitrust scrutiny weigh consumer-welfare goals against administrative concerns. That same balance should guide analysis *within* the rule-of-reason tier.

A. The Court's Tiers Of Antitrust Scrutiny Balance Consumer-Welfare Goals Against Administrative Considerations

The judiciary's "evolution" concerning how to assess a restraint's reasonableness has "represent[ed] an effort carefully to blend" two factors: (1) "the pro-competitive objectives of the law of antitrust," and (2) "administrative necessity." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 794 (1999) (Breyer, J., concurring in part and dissenting in part).

1. Section 1 protects the competition that promotes consumer welfare

To identify unreasonable restraints, courts must begin with "the point of the law." Robert Bork, *The Antitrust Paradox* 50 (1993). "Congress designed the Sherman Act as a 'consumer welfare prescription.'" *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (citation omitted). The Act protects consumers by protecting competition. "It rests on the premise that the

unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1957). Competition advances consumer welfare by promoting allocative efficiency and lowering prices for products to levels "approximating [their] marginal cost." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986).

Section 1's consumer-welfare focus bars courts from assessing a restraint's "reasonableness" in the abstract divorced from competitive conditions. Bork, *supra*, at 426-29. Even when, for example, lawyers refused to represent indigent criminal defendants in order to promote better legal representation, the antitrust laws did not consider that restraint's "social utility." *FTC v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 421-22 (1990). A restraint's reasonableness also does not turn on the "process" that a party receives; "the absence of procedural safeguards can in no sense determine the antitrust analysis." *Nw. Wholesale Stationers v. Pac. Stationery & Printing*, 472 U.S. 284, 293 (1985). Nor is the Sherman Act a tort law. "Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993).

Instead of undertaking an amorphous reasonableness inquiry, courts must "focus[] directly on the challenged restraint's impact on competitive conditions." *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 688. A restraint is unreasonable only if *anticompetitive*, and reasonable if *procompetitive*. *Atl. Richfield Co. v.*

USA Petroleum Co., 495 U.S. 328, 342 (1990). And these terms have special meaning in this context; they distinguish restraints that are "harmful to the consumer" from restraints that are in the "consumer's best interest." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). An anticompetitive restraint "obstructs the achievement of competition's basic goals—lower prices, better products, and more efficient production methods." *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.). A procompetitive restraint increases economic efficiencies in the production or distribution of a product and thereby reduces its cost or increases its quality. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979).

A comparison of naked horizontal restraints with purely vertical ones shows this consumer-welfare divide. The Court has viewed with skepticism naked *horizontal* restraints—i.e., restraints between firms at the same market level (like competing manufacturers) that seek only to restrict *interbrand* competition (competition among different brands of similar products). A cartel's "[r]estrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit." *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 107-08 (1984). Those restraints represent the "core case for antitrust regulation" because they generate an "externality" harming consumers. Douglas Ginsburg, *Rationalizing Antitrust*, 35 Antitrust Bull. 329, 331 (1990). Cartels impose social costs in the form of "a transfer of wealth from consumers to producers as well as a deadweight loss to society" from lost transactions that do not occur because of

higher prices. *Id.* Cartel members will also expend resources to obtain greater shares of the cartel's profits, and those "higher costs are a cost of" cartels too. Richard Posner, *Antitrust Law* 14 (2d ed. 2001). Thus, "the primary purpose of the antitrust laws is to protect interbrand competition" and prevent these consumer losses. *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997).

The Court requires greater analysis for pure *vertical* restraints—i.e., restraints between firms at different market levels (such as a manufacturer and retailers) that seek only to limit *intrabrand* competition (competition among firms selling the same brand). These restraints—like an agreement between a manufacturer and a retailer about the price that the retailer may charge for the manufacturer's goods—can be anticompetitive if they facilitate a cartel. *Leegin*, 551 U.S. at 892-94. Yet a manufacturer may impose them to enhance the "'efficient distribution of [its] products.'" *Id.* at 901-02 (citation omitted). Resale price maintenance, for example, may fix a "free rider" problem. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 212-13 (D.C. Cir. 1986) (Bork, J.). Retailers who furnish services for a product may generate greater demand for it (but have to price it at a level that accounts for the services). If "discounting retailers" who do not furnish the services undercut the service providers, it could eliminate the services that the manufacturer seeks. *Leegin*, 551 U.S. at 890-91. Thus, *intrabrand* restraints may enhance *interbrand* competition by allowing consumers to "choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between." *Id.* at 890.

2. The Court has implemented the antitrust laws' consumer-welfare goals with institutional considerations in mind

To identify unreasonable restraints, courts must also confront administrative concerns. "[U]nlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients." *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.). That system should seek "to minimize the total costs of (1) anticompetitive practices that escape condemnation; (2) competitive practices that are condemned or deterred; and (3) the system itself." Frank Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135, 158 (1984). It should also seek to provide clear rules. *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 452 (2009).

The Court's cases account for these concerns. Its test for predatory-pricing claims—claims that a producer has cut prices below cost to eradicate rivals and recoup monopoly profits later—provides a good example. There, the Court has noted, "the costs of an erroneous finding of liability are high" because "'[t]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition.'" *Brooke Grp.*, 509 U.S. at 226-27 (citation omitted). The Court thus opted for demanding liability rules. *Id.* Similarly, the Court has refused to allow a price-fixer to assert, as a defense to a damages action, that a plaintiff retailer merely passed on higher prices to its customers. *See Hanover Shoe, Inc. v. United Shoe*

Mach. Corp., 392 U.S. 481, 491-94 (1968). The Court believed that, even though "pass-on" occurs, it could be difficult to measure "in the real economic world rather than an economist's hypothetical model." *Id.* at 493; *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 731-33 (1977); *cf. Pac. Bell.*, 555 U.S. at 453.

Similar administrative concerns drive the Court's two "methods" for answering Section 1's reasonableness question—the *per se* rule and the rule of reason. *NCAA*, 468 U.S. at 103 The Court treats some restraints—e.g., naked horizontal agreements to fix prices or divide markets—as *per se* illegal. *Leegin*, 551 U.S. at 886. The Court does so "'once experience with a particular kind of restraint enables the Court to predict with confidence that'" it would almost always be enjoined because of its "predictable and pernicious anticompetitive effect." *Khan*, 522 U.S. at 10 (citations omitted). These *per se* rules serve administrative goals. Even if a restraint covered by a *per se* rule might sometimes be procompetitive, that rule reduces costs by "provid[ing] guidance to the business community" and "minimiz[ing] the burdens on litigants and the judicial system." *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977).

Where, by contrast, the "economic impact" of a restraint is "not immediately obvious," the administrative balance tips away from *per se* rules toward the more nuanced rule of reason. *Ind. Fed'n*, 476 U.S. at 459. In that setting, the risk that a *per se* rule would invalidate too much efficiency-enhancing conduct outweighs that bright-line rule's administrative savings. *Leegin*, 551 U.S. at 894-95. The rule of reason instead applies on a *restraint-by-restraint* basis to separate restraints that impede competition merely

to raise prices (and harm consumers) from restraints that increase productive or distributive efficiencies (and help consumers). *Id.* at 885-86.

B. These Consumer-Welfare And Institutional Concerns Should Guide The Rule Of Reason

Under the rule of reason, this Court has noted, "the factfinder weighs all of the circumstances," *GTE Sylvania*, 433 U.S. at 49, "including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect," *Khan*, 522 U.S. at 10. Yet a consider-everything approach "produces notoriously high litigation costs and unpredictable results." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015); Herbert Hovenkamp, *The Antitrust Enterprise* 105 (2005); Easterbrook, *supra*, at 154-57. The Court thus should structure the rule in a way that "avoid[s], on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences." *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2238 (2013).

Courts have long attempted to achieve this balance through a burden-shifting approach: (1) a plaintiff must prove that a restraint has anticompetitive effects harmful to consumers; (2) the defendant may then provide the restraint's procompetitive, efficiency rationale; and (3) the plaintiff can retort that any asserted efficiencies could be achieved through less an-

ticompetitive means. 7 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1502, at 390 (3d ed. 2010); Michael Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. Rev. 1265, 1268-69; *e.g.*, *United States v. Brown Univ.*, 5 F.3d 658, 668-69 (3d Cir. 1993). This approach establishes a general rule-of-reason framework, while leaving flexibility for individual adjustments.

1. *Government's Burden.* The Government must prove that a restraint injures consumers. That is, the restraint must restrict competition in a way that undermines competition's purpose to advance allocative efficiency by reducing prices to levels approaching marginal costs. *Ind. Fed'n*, 476 U.S. at 459.

"'[T]he quality of proof required'" to meet this burden "'should vary with the circumstances.'" *Actavis*, 133 S. Ct. at 2238 (citation omitted). As the first step in any rule-of-reason case, therefore, courts must assess the restraint's "potential for genuine adverse effects on competition." *Ind. Fed'n*, 476 U.S. at 460. Identifying these harms allows courts "to make a preliminary judgment about the inferences that can be drawn from everyday experience or economic theory with respect to the probability that any such evil will occur, its likely magnitude, and what evidence might be probative." 7 Areeda & Hovenkamp, *supra*, ¶ 1503, at 390-91. If a court concludes that anticompetitive harms are likely, it should require less demanding proof. And vice versa.

On one end of this spectrum, a "'quick-look' analysis" applies if "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompet-

itive effect on customers and markets." *Cal. Dental Ass'n*, 526 U.S. at 770. Given the likely consumer harms, this truncated analysis eliminates the Government's burden to show *actual* effects before requiring defendants to offer efficiency rationales. *NCAA*, 468 U.S. at 109-10 & n.42. This doctrine often applies to "horizontal restraint[s]" that fall outside the *per se* rule, but that restrict *interbrand* competition among competitors. *Id.* at 99; *e.g.*, *Cal. Dental Ass'n*, 526 U.S. at 769-70.

On the other end, an "inquiry into market power and market structure" governs restraints with unclear effects. *Copperweld*, 467 U.S. at 768. Under the most demanding requirements, the Government must establish that a restraint will have, or has had, negative effects on allocative efficiency and consumer welfare—e.g., that it will raise market prices above those that would exist with competition. *NCAA*, 468 U.S. at 109 n.38 (defining "market power"). The Government may meet this burden through direct or indirect methods. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). Under the direct method, the Government may prove that the restraint has had "'actual detrimental effects, such as a reduction of output.'" *Ind. Fed'n*, 476 U.S. at 460 (citation omitted). Yet "[s]uch proof is often impossible," as when a restraint has not long existed. *Brown Univ.*, 5 F.3d at 668. Under the indirect method, then, the Government may show that the defendant has the ability to affect industrywide prices, based on such things as its market share, barriers to new entry, or other market characteristics. *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000).

That said, the rule of reason does not create a strict dichotomy between the quick look applicable to obviously anticompetitive restraints and the "plenary market examination" reserved for potentially procompetitive ones. *Cal. Dental Ass'n*, 526 U.S. at 779. "What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." *Id.* at 781.

2. *Defendant's Burden.* If the Government meets its burden, "the defendant bears the burden of establishing a procompetitive justification." *Id.* at 788 (Breyer, J., concurring in part and dissenting in part). The "defendant may show in the antitrust proceeding that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason." *Actavis*, 133 S. Ct. at 2236. Placing the onus on the defendant to provide an efficiency rationale makes sense—just as it makes sense for Title VII defendants to provide non-discriminatory reasons for employment actions. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000). As "the author of the restraints," defendants are "in a better position to explain why they are profitable and in consumers' best interests." Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1505 (Supp. 2017).

An effort to create efficiencies represents the classic procompetitive rationale. Entities may cooperate to produce or distribute their products at a lower cost or higher quality. By buying in bulk, for example, a retailer cooperative may generate "economies of scale" that retailers could not achieve alone, thereby reducing resale prices. *Nw. Wholesale Stationers*, 472 U.S. at 295. Or a merger between beef-packing

firms might create "multiplant efficiencies" in production, allowing them to lower prices by lowering marginal costs. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 115 (1986). Or copyright owners might agree on a blanket license that allows purchasers to use their collective works in order to reduce the transaction costs associated with thousands of individual licenses. *Broad. Music*, 441 U.S. at 21.

But other allegedly procompetitive rationales are no such thing. Firms, for example, cannot justify a restraint based on "the threat of loss of profits" that competition creates. *Cargill*, 479 U.S. at 117. Ever since then-Judge Taft's decision in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), courts have rejected such cries of "ruinous competition." *Id.* at 283. Section 1 is not "designed to save inefficient" businesses "from their inability to compete" with efficient ones; it protects "'*competition*, not *competitors*.'" *Leegin*, 551 U.S. at 906 (citation omitted). So a corporation may not "insulate" its product "from the full spectrum of competition because of [an] assumption that the product itself is insufficiently attractive to consumers." *NCAA*, 468 U.S. at 117.

Competitors also cannot foreclose competition in one area because they believe it should occur elsewhere. *See United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). For example, they cannot justify a horizontal agreement limiting *price* competition on the ground that this limitation channels their competition into product *quality*. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 693-95. "This is not the kind of procompetitive virtue contemplated under the Act, but rather [a] mere consequence of limiting price competition." *Brown Univ.*, 5 F.3d at 675.

II. THE GOVERNMENT MET ITS BURDEN BY PROVING THAT THE ANTI-STEERING PROVISIONS RESTRAIN COMPETITION AND HARM CONSUMERS

The Government met its burden to prove that Amex's anti-steering provisions are anticompetitive because the provisions raised *industrywide* credit-card prices for merchants above levels that would exist if the networks competed over those prices. That proof sufficed to trigger Amex's burden to offer an efficiency reason for the provisions.

A. Amex's Restraints, Unlike Vertical Restraints In Other Cases, Implicate Section 1's Primary Purpose

As in any rule-of-reason case, the Court should begin with the specific "'circumstances.'" *Actavis*, 133 S. Ct. at 2238 (citation omitted). Two circumstances—one about the specific restraint, the other about the specific market—show that Amex's anti-steering provisions fall within Section 1's core.

1. *Specific Restraint.* Amex's anti-steering provisions bar its merchant customers from encouraging its cardholder customers to use an *Amex competitor's* cheaper card—such as by offering price discounts or non-price perks. Pet. App. 100a-01a. These provisions qualify as vertical restraints because entities at different market levels (Amex and merchants) entered into the agreements in which they are located. *Id.* at 29a-30a, 105a-07a.

These vertical restraints, however, fundamentally differ from vertical restraints that the Court has confronted governing the way in which a manufacturer distributes its goods. The agreements between a

manufacturer and its retailers to set minimum resale prices (in *Leegin*) or to divide retail territories (in *GTE Sylvania*) restricted only intrabrand competition for the manufacturer's product. *Leegin*, 551 U.S. at 890; *GTE Sylvania*, 433 U.S. at 51-52. And those restraints existed to *increase* interbrand competition between the manufacturer's product and competing ones. *Leegin*, 551 U.S. at 890. In this case, by contrast, Amex's anti-steering provisions exist to *decrease* that interbrand competition. They "prevent direct competition between the networks from occurring at the point of sale." Alan Frankel & Allan Shampine, *The Economic Effects of Interchange Fees*, 73 Antitrust L.J. 627, 672 (2006). While *vertical* in nature, therefore, these anti-steering provisions have *horizontal* effects in that they reduce interbrand competition among competitors selling different brands—Amex, Visa, MasterCard, and Discover.

This distinction matters. Unlike the restraints in *Leegin* or *GTE Sylvania*, Amex's provisions trigger the "primary purpose of the antitrust laws": to protect *interbrand* competition. *Khan*, 522 U.S. at 15. In fact, the Court's cases instruct the judiciary to "distinguish among the challenged restrictions on the basis of their individual potential for intrabrand harm or interbrand benefit." *See GTE Sylvania*, 433 U.S. at 52 (criticizing earlier case for failing to do so). *Leegin* even recognized that resale price maintenance *might* harm consumers if it has a horizontal effect by facilitating cartels that reduce interbrand competition. 551 U.S. at 892-93. Here, too, Amex's provisions have the potential for interbrand harm.

2. *Specific Market.* Setting aside the disagreement over whether each side of the credit-card plat-

form counts as a separate "market," no dispute now exists that credit cards themselves make up a distinct market from alternative payment methods (such as cash or debit). Pet. App. 5a n.1, 122a. That fact has significance too.

With only four competitors, this "market remains highly concentrated." *Id.* at 153a. In fact, it is "'well above'" a common index's "'threshold for being highly concentrated.'" *Id.* (quoting Tr. 3941 (Katz)). In addition, it has "high barriers to entry." *Id.* New entry would entail "sizable setup costs." *Id.* at 154a. And, under the "'chicken and the egg problem,'" a new credit-card network "would struggle to convince merchants to join [the] network without a significant population of cardholders and, in turn, would also struggle to convince cardholders to carry a card associated with [the] network that is accepted at few merchants." *Id.* That no network has emerged since 1985 illustrates these entry barriers. *Id.*; Tr. 820-23 (Hochschild/Discover). Before this suit, moreover, *all* four networks used similar anti-steering provisions. Pet. App. 66a-67a, 227a.

Thus, vertical restraints limiting interbrand competition have blanketed a concentrated market with high entry barriers. Even for vertical restraints limiting *intrabrand* competition, the anticompetitive potential increases if all producers in a "highly concentrated industry" pursue a high-price, high-service strategy. It eliminates a consumer's ability to choose the low-price option. F.M. Scherer, *The Economics of Vertical Restraints*, 52 Antitrust L.J. 687, 704 (1983); Easterbrook, *supra*, at 162 (noting that "every one of the potentially-anticompetitive outcomes of vertical arrangements depends on the uniformity of the prac-

tice"). Consumers cannot "choose among low-price, low-service" products and "high-price, high-service" ones if the former do not exist in the market. *Leegin*, 551 U.S. at 890.

In sum, while Amex's anti-steering provisions are vertical in nature, they have horizontal effects on *interbrand* competition and exist within a *concentrated* industry. The Court thus should subject them "to more careful scrutiny" than would apply to a lone producer's vertical restraint restricting *intrabrand* competition in a *competitive* market. *Id.* at 897.

B. By Limiting *Interbrand* Competition, The Anti-Steering Provisions Raise Prices Above Competitive Levels

No matter what standard of proof applies, the Government's "direct evidence of anticompetitive effects" satisfied its burden to show that Amex's anti-steering provisions harm consumers. *Toys "R" Us*, 221 F.3d at 937. Economic theory, the history of Amex's anti-steering provisions, and the provisions' stark real-world effects all prove that the provisions raise the prices that the *entire industry* charges merchants to a higher level than would exist if the networks competed over those prices.

1. *Economic Theory.* Amex's anti-steering provisions have the "'potential for genuine adverse effects'" on price competition. *Actavis*, 133 S. Ct. at 2234 (citation omitted). By prohibiting competition "at the point of sale" among Amex, Visa, MasterCard, and Discover, Frankel & Shampine, *supra*, at 672, these provisions "disrupt the proper functioning of the price-setting mechanism of the market," *Ind. Fed'n*, 476 U.S. at 461-62.

Anti-steering provisions generate this inefficiency because of the credit card network's two-sided nature. Pet. App. 195a. In a normal market, "one would expect to see changes in price result in higher or lower demand for or output of the product or service being sold, depending on the nature of the price change." *Id.* In a credit-card market where merchants cannot steer cardholders to low-cost cards, things do not work this way. A network's price decrease will *not* generate higher demand (and output) for the price-cutting network. *Id.* at 195a-97a.

Merchant demand for a cost-cutting network will be unresponsive to lower prices because, short of not accepting a network's card for *all* transactions, merchants do not make the decision about which card to use for any *particular* one. Cardholders do. Yet cardholders do not internalize the costs that they impose on merchants when doing so, and the anti-steering provisions deprive them of "information" useful for deciding whether a card is "cost justified" for the transaction. *Ind. Fed'n*, 476 U.S. at 461; *cf.* F. A. Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519, 526 (1945). Indeed, Amex's provisions bar merchants even from having notices telling customers about the costs of cards. Pet. App. 101a. Merchants thus lack the ability to respond to a network's lower prices by shifting volume. J.A. 215. And no rational network will cut merchant prices because price cuts will not increase output; they will merely reduce revenue. *Id.*; Pet. App. 195a-97a. These dynamics will cause higher merchant prices across the *industry*. J.A. 224.

This should be unsurprising. "To restrain truthful advertising about lower prices"—as the anti-

steering provisions effectively do—"is likely to restrict competition in respect to price." *Cal. Dental Ass'n*, 526 U.S. 784-85 (Breyer, J., concurring in part and dissenting in part).

2. *History Of Restraints.* The "history" of Amex's modern anti-steering provisions proves the pricing effects that economic principles would predict. *Khan*, 522 U.S. at 10. In the early 1990s, Visa sought to challenge Amex's growing share. At this time, Visa believed, Amex's 3.25% merchant rate was significantly larger than Visa's 1.75% rate. J.A. 206. "Visa sought to call merchants' attention to what it viewed as a 'key Amex vulnerability': namely, [Amex's] higher merchant discount rates." Pet. App. 199a (citation omitted). Its "profit improvement calculator" sharply illustrated the savings that merchants could achieve merely by shifting Amex volume onto Visa. J.A. 101, 207-09. Visa also began a "We Prefer Visa" campaign identifying the higher prices and encouraging merchants to steer volume to its cheaper network. Pet. App. 199a-200a; J.A. 210-11.

These price advertisements had a concrete effect. Merchants shifted volume to Visa by steering cardholders away from expensive Amex cards. Pet. App. 199a-200a; Tr. 4487 (Chenault/Amex). This "share shift away from [Amex] to Visa" sometimes reached "the double digits." Tr. 3843 (Katz). An initiative in Vail, Colorado, even "'showed a 25 to 45 percent shift.'" Tr. 3324-25 (Morgan/Visa) (citation omitted).

This competition put *downward* pricing pressure on Amex, which considered lowering its merchant prices in response. Tr. 4501 (Chenault/Amex). Instead, Amex strengthened its anti-steering provi-

sions and enforced them more vigorously. Pet. App. 200a. It told merchants to "live up to your contract," added contract terms prohibiting preference campaigns, and effectively put an end to those price advertisements. Tr. 4490-93 (Chenault/Amex); J.A. 199. Since then, Amex has required merchants (like Travelocity) not to list competitors (like MasterCard) as preferred cards. Pet. App. 202a. And it has terminated merchants for disregarding the anti-steering provisions. Tr. 3332-34 (Morgan/Visa). These restrictions on price competition achieved their intended result by stopping the shift toward cheaper cards that occurred with merchant steering. Pet. App. 199a-202a. Amex's modern anti-steering provisions thus spring from a campaign to restrict credit-card price competition, not an effort to achieve efficiencies in the distribution of Amex's products. *Id.*

3. *Real-World Effects.* The district court found—as a fact—that Amex's provisions led "all four networks to raise their swipe fees more easily and more profitably than would have been possible were merchants permitted to influence their customers' payment decisions." *Id.* at 207a. The provisions also "render[ed] low-price business models untenable," thereby "resulting in higher prices for merchants and their consumers." *Id.* at 192a.

The evidence confirms these findings. The anti-steering provisions restrain the *entire* industry—not just *Amex*—from competing over merchant prices. An Amex executive conceded that "I don't think anybody's business strategy is to be cheaper than the next guy" and that Amex does not "compete on costs." Tr. 2668 (Funda/Amex). Discover's president, too, recognized that "giving the retailers a discount with-

out getting anything in return didn't make business sense," and that a low-price option is not "viable without the ability to shift share from competitors to Discover at the point of sale." Tr. 853-54 (Hochschild/Discover). Merchants see this lack of price competition. Pet. App. 198a. A Southwest Airlines executive called the market "broken" because networks do not compete for business on the "basis of price." Tr. 2440 (Priebe/Southwest). And a Home Depot executive noted that "every year [the cost of accepting credit cards] continues to go up," but that "[t]here is very little that [they] can do" to prevent the increases. Tr. 1222-23 (Kimmet/Home Depot).

The pricing practices of all four networks show the lack of competition over merchant prices.

Amex. Between 2005 and 2010, Amex engaged in many "Value Recapture" initiatives—Amex's phrase for price increases. Pet. App. 166a. These initiatives sought to maintain Amex's traditional price premium over Visa and MasterCard, whose own price increases had been reducing that gap. *Id.* at 175a; Tr. 2667 (Funda/Amex). The initiatives allowed Amex to raise prices on "merchants accounting for 65% of the network's annual U.S. charge volume." Pet. App. 208a. For several merchants, Amex raised prices more than once. *Id.* at 167a-70a. It raised prices on airlines, for example, by "between 7% and 15%." *Id.* at 167a. In total, the initiatives generated "$1.3 billion in incremental pre-tax income." *Id.* at 170a.

Amex's anti-steering provisions facilitated these increases. *Id.* at 208a. Amex's own analysis about whether it could raise prices did not even consider the possibility that large merchants would steer cus-

tomers away from Amex as a result. *Id.* Instead, the analysis considered only how far Amex could raise prices without large merchants "ceas[ing] acceptance altogether." *Id.* These merchants, unable to steer to low-cost cards, lacked "an important safety valve that would have moderated" the increases. *Id.* Many merchants reiterated that the anti-steering provisions limit their "leverage" to keep prices in check. Tr. 2418 (Priebe/Southwest); Tr. 1258 (Kimmet/Home Depot); Tr. 3219-20 (Gibson/Sinclair Oil); Tr. 580-81 (Bouchard/Sears).

Visa/MasterCard. Anti-steering provisions also enabled Visa and MasterCard to raise their merchant prices "without fear of other networks undercutting their prices in order to gain share." Pet. App. 210a. Both networks increased their all-in merchant rates by over 20% over twelve years. *Id.* Despite Amex's corresponding price hikes, Visa and MasterCard's increases have cut sharply into its traditional price premium. Tr. 2667 (Funda/Amex). The increases, which Visa and MasterCard imposed with "virtual impunity," further "suggest[] an absence of inter-network competition on the basis of price attributable to rules prohibiting merchant steering." Pet. App. 180a. Something is wrong with a market in which the main competitors vigorously compete over who can charge the *higher* prices.

Discover. Discover has also increased merchant prices, but only after its effort to become the low-price option foundered in the face of the anti-steering provisions. Pet. App. 203a-07a. Its failed efforts to raise output by lowering price—the most procompetitive of actions—reinforce economic theory.

In the late 1990s, "Visa and MasterCard were rapidly increasing their prices to merchant[s]." Tr. 833 (Hochschild/Discover). Discover sensed an opportunity to increase its market share by lowering its price. Pet. App. 204a. It encouraged merchants to save money by steering customers to Discover's low-cost network. *Id.* at 204a-05a; Tr. 833-48 (Hochschild/Discover). The campaign did not get off the ground, however, because anti-steering provisions prohibited merchant steering. Pet. App. 205a; Tr. 848-49 (Hochschild/Discover). So Discover abandoned its low-price strategy. With merchants unable to "shift share" to Discover, that strategy meant "giving away money in the form of a lower [price] without getting any benefit in return." Tr. 849 (Hochschild/Discover).

In the campaign's wake, Discover began raising prices "to more closely align its merchant pricing with that of Visa and MasterCard." Pet. App. 206a; Tr. 854 (Hochschild/Discover). Between 2000 and 2007, it raised prices by about 24%. Pet. App. 206a. If, however, "merchants could steer transactions to Discover," it "would aggressively pursue a strategy of lowering [its] prices and providing incentives to merchants that would steer incremental volume to Discover." Tr. 872 (Hochschild/Discover).

These real-world pricing effects for the *entire industry* met the Government's burden to show that Amex's provisions harm consumers. The burden then shifted to Amex to provide a procompetitive reason for them. *Actavis*, 133 S. Ct. at 2236.

III. The Second Circuit Wrongly Required The Government To Prove That The Higher Prices Were Not "Offset" By Higher Rewards, But It Did So In Any Event

To reach a contrary result, the Second Circuit did not dispute the *fact-findings* that Amex's anti-steering provisions restricted interbrand price competition and raised the prices that the credit-card networks charge merchants. Instead, it held that the district court *legally erred* by "elevat[ing] the interests of merchants above those of cardholders." Pet. App. 49a. According to the court, the Government needed to show that these price increases "made *all* Amex consumers on both sides of the platform—*i.e.*, both merchants and cardholders—worse off overall." *Id.* at 51a. Because no "reliable evidence" accounted for how the merchant price increases affected cardholder rewards, the court held, the Government did not meet this initial burden. *Id.* at 54a.

The Second Circuit erred. *First*, it mistakenly required the Government to prove that higher merchant prices were not "offset" by higher Amex cardholder benefits. *Second*, it ignored the fact-findings showing that the Government met this burden.

A. Section 1 Presumes That Higher Prices Caused By Restraining *Interbrand* Price Competition Inflict Net Consumer Harms

The Second Circuit wrongly required the Government to prove that the higher merchant prices caused by Amex's restrictions on interbrand price competition were not counterbalanced by higher cardholder rewards. Even *assuming* that the entire credit-card platform counts as the "relevant market,"

this conclusion conflicts with cases holding that competition sets a product's "optimal" attributes; economic theory illustrating that price restraints harm consumers; and traditional administrative concerns. And these factors all confirm that the Second Circuit should not have departed from this Court's usual market-definition test by defining the "relevant market" to include cardholders and merchants.

1. The Second Circuit's analysis conflicts with the Sherman Act's guiding light that competition generates "optimal" products

The Second Circuit held that Amex could limit price competition with Visa, MasterCard, and Discover to obtain its "optimal" rewards level. Pet. App. 50a. Amex's anti-steering provisions, the court reasoned, "protect[]" the "revenue" that funds these rewards from price cuts by competitors. *Id.* That reasoning represents "nothing less than a frontal assault on the basic policy of the Sherman Act." *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695. Section 1 rests on the "legislative judgment" that competition among different suppliers—not decisions by public or private central planners—generates the *optimal* level of a product's price and non-price characteristics. *Id.*

Indeed, this Court has repeatedly refused to uphold attempts to limit interbrand competition on the ground that those restrictions merely "channeled" competition into "proper" areas. It has said that competition "cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy." *Topco*, 405 U.S. at 610. Within a

sector, moreover, "[t]he assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers"—i.e., by competition governing each of those elements. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695.

Many cases illustrate this point. In *National Society of Professional Engineers*, engineers entered into a horizontal agreement not to engage in price bidding. 435 U.S. at 693-94. They defended that *price* restraint on the ground that it increased competition over *quality*, "preventing the production of inferior work." *Id.* The Court rejected this defense, noting that it had "never accepted such an argument." *Id.* at 694. When doing so, the Court did not require the Government to prove that the higher prices did not outweigh the higher quality. *Id.* at 693-96. Instead, it explained that the "Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services." *Id.* at 695. So "the statutory policy precludes inquiry into the question whether competition is good or bad." *Id.*

The Court made the same point in *Indiana Federation of Dentists*, which involved a three-way relationship between dentists, insurers, and patients. The *dentists* entered into a horizontal agreement not to provide x-rays to *insurers*, which had requested them to decide whether proposed treatments were cost justified. 476 U.S. at 459, 461. The dentists argued that the reduction in price competition (and higher *insurer* costs) would increase the quality of

care for *patients*. *Id.* at 462-63. The Court rejected this defense that "an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices." *Id.* at 463. Competition sets the optimal level of price and quality characteristics in dental care, too. *Id.* The Court nowhere required the Government to prove that the asserted higher quality did not offset the higher prices. *Id.*; *Brown Univ.*, 5 F.3d at 675 (rejecting argument that, "by eliminating price competition among participating schools," a restraint "channelled competition into areas such as curriculum, campus activities, and student-faculty interaction").

Invoking similar reasoning, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), held that the *per se* rule applied to a horizontal agreement among beer wholesalers not to extend free credit to retailers. *Id.* at 650. A lower court had rejected the *per se* rule because the restriction on competition with respect to credit could "sharpen competition with respect to price." *Catalano, Inc. v. Target Sales, Inc.*, 605 F.3d 1097, 1099 (9th Cir. 1979). This Court refused to depart from the *per se* rule on that ground. 446 U.S. at 646-50. It conceded that a restriction on competition over credit may "lead in a competitive market to corresponding decreases in the invoice price." *Id.* at 649. But that fact did not rebut the *per se* rule or require a plaintiff to prove an inadequate offset—i.e., that the credit reduction was not offset by a commensurate price reduction. *Id.*

The same logic informs the rule of reason here. The Second Circuit nowhere disputed that Amex's anti-steering provisions restrict *interbrand* competi-

tion with Visa, MasterCard, and Discover over merchant prices. Instead, it justified those provisions on the ground that they protect the "important revenue" that funds Amex's rewards from ruinous price competition. Pet. App. 50a; *cf. Addyston Pipe*, 85 F. at 283. But "*competition* should choose the optimal mix" of merchant prices and cardholder rewards, just as it chooses the optimal mix of a product's price and quality attributes. Areeda & Hovenkamp, *supra*, ¶ 562e (Supp. 2017). "[T]he Rule of Reason does not support" the Second Circuit's view that this price competition is "unreasonable." *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 696. And Amex cannot justify its interbrand price restraints based on the "threat of loss of profits" that price competition would create. *Cargill*, 479 U.S. at 117. Nor can it "insulate" its high-price, high-reward product "from the full spectrum of competition because of [an] assumption that the product itself" would be unattractive to consumers if they actually had the option to choose low-price alternatives. *NCAA*, 468 U.S. at 117.

To be sure, cases like *National Society of Professional Engineers* and *Indiana Federation of Dentists* involved *horizontal* agreements among competitors to restrict interbrand price competition, whereas this case involves *vertical* agreements between Amex and its merchant customers. But that difference does not matter for reasons explained above. Unlike other vertical agreements, Amex's agreements have the horizontal effect of restricting interbrand price competition between all competitors, and so trigger "the primary purpose of the antitrust laws." *Khan*, 522 U.S. at 15. As with a horizontal restraint, Amex's anti-steering provisions "impose[] [its] views of the

costs and benefits of competition [over merchant prices] on the entire marketplace." *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695.

The Second Circuit relegated this distinction between *interbrand* and *intraband* competition to a footnote. Pet. App. 30a n.42. Yet it is not just a "meaningful difference"; it is a critical one. *Id.* If Amex's restraints effectively raised only *its* prices (to account for *its* rewards), they would be analogous to resale price maintenance. Interbrand competition would act as a check on Amex's higher prices because low-price competitors could undercut Amex's share if its rewards did not add sufficient value to offset its higher prices. *Leegin*, 551 U.S. at 896. But *no* such check exists here given the restraints' interbrand effect. Discover's failed attempt to offer a low-cost option vividly illustrates this fact. Pet. App. 204a-07a.

In sum, the Second Circuit adopted an argument—that competition over merchant prices is "bad"—that this Court has "never accepted." *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 694-95. This case should not be the first one in which it does so.

2. The Second Circuit's analysis conflicts with economic principles illustrating that interbrand price restrictions harm consumers even if competition occurs elsewhere

Section 1's goal—consumer welfare—justifies the Court's refusal to uphold attempts to restrict interbrand price competition in order to channel competition elsewhere. Such restrictions create a misallocation of resources, not allocatively efficient markets.

Price cartels prove this point. The cartel's *price* restriction will lead members to increase *non-price* competition over service or quality. Posner, *Antitrust Law*, *supra*, at 14; *see generally* George Stigler, *Price and Non-Price Competition*, 76 J. Pol. Econ. 149 (1968); Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies and Theft*, 5 W. Econ. J. 224 (1967). "Each member of the cartel will have an incentive, by expending resources on making his output more valuable to consumers than the output of the other members of the cartel, to increase his sales relative to the other cartelists and thereby engross a larger share of the cartel profits." Posner, *Antitrust Law*, *supra*, at 14. But courts have never held that this consumer benefit justifies a departure from the *per se* rule. *See Leegin*, 551 U.S. at 893. Nor has this benefit led to a mandate to prove that a cartel's price increases were not "offset" by service increases. *Cf. Brown Univ.*, 5 F.3d at 675.

That is because this consumer benefit will only *partially* offset the higher prices. "The reason it is only partially offsetting is that if consumers valued the additional services generated by this competition above its cost, presumably the services would have been produced in a *price-competitive market* as well." Posner, *Antitrust Law*, *supra*, at 14 (emphasis added). The cartel creates a "misallocation of resources" in which consumers receive marginal benefits that they do not value at their marginal costs. Richard Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 Univ. Chi. L. Rev. 6, 20 (1981).

The price-controlled airline industry provides a concrete example of this effect. The Civil Aero-

nautics Board set prices too high, which "in turn stimulated service competition" by the airlines. Scherer, *supra*, at 703. But this price setting generated more services than consumers would choose in price-competitive markets. *Id.* at 703-04 (citing George Douglas & James Miller, *Quality Competition, Industry Equilibrium, and Efficiency in the Price-Constrained Airline Market*, 64 Am. Econ. Rev. 657 (1974)). Most travelers, for example, likely did not view "the piano bars that American Airlines installed in its Boeing 747 airliners" as worth their costs. Richard Posner, *Economic Analysis of Law* 385 (7th ed. 2007). After all, airlines now drill holes in beverage-cart drawers to reduce weight (and fuel costs). Tr. 222 (Thiel/Alaska Airlines).

Similar principles are at work here. Amex's anti-steering provisions—by limiting the industry's competition for merchant prices—permit competition in unrestricted areas. Card issuers thus compete over cardholder rewards. But, as with a cartel, the rewards do not offset the higher prices. Tr. 3854 (Katz); Frankel & Shampine, *supra*, at 634 & n.25. If they did, the rewards would be provided in a competitively priced market (and Amex would not need its restraints). Posner, *Antitrust Law*, *supra*, at 14. Instead, those restraints misallocate resources because consumers buy rewards that they do not value at their costs. In this respect, Amex's argument that it needs price restraints to provide its rewards is like an airline claiming that it needs price restraints to provide its piano bars.

If anything, the two-sided nature of the credit-card platform increases the inefficiencies. Amex cardholders do *not* pay the full costs of their rewards.

Instead, merchants pass on higher credit-card costs to *all* consumers in the form of higher retail prices. Pet. App. 210a-11a; Tr. 3855 (Katz). Thus, Amex's "customers do not internalize the full cost of their payment choice" and impose costs on *other* consumers. Pet. App. 195a, 211a. This negative externality causes consumers to overuse high-cost cards because the cardholders receive *all of the cards' benefits* but shift *some of their costs* to others. Because the anti-steering provisions "distort competitive markets by steering consumers toward using more costly and less efficient payment methods," Frankel & Shampine, *supra*, at 672, the Second Circuit was wrong to rely on increased credit-card usage as a basis for upholding those provisions, Pet. App. 52a.

This negative externality also illustrates that Amex's reliance on this Court's vertical-restraint cases flips them on their head. The restraints in those cases sought to eliminate a free-rider problem in which no-frills retailers enjoyed *some of the benefits* of the provision of retail services, but the service-providing retailers bore *all of their costs*. *Leegin*, 551 U.S. at 890-91. The restraints in this case, by contrast, seek to exacerbate a free-rider problem by increasing cross-subsidies among consumers. Allocative efficiency and consumer welfare are not enhanced if Discover cardholders pay higher prices at the gas station to subsidize an Amex cardholder's frequent-flyer miles.

Even Amex's *own* cardholders are worse off. Without the anti-steering provisions, merchants could offer Amex cardholders incentives to use different cards. "[I]f a merchant wants to say to [an Amex cardholder], I'll give you a one percent discount if you

use Discover," the cardholder would get to *choose* between the cheaper transaction (with Discover) and the more expensive one (with Amex plus rewards). Tr. 4621 (Chenault/Amex). This choice would help all cardholders internalize the costs of their cards, giving them greater choice in the process. Additionally, for every Amex customer who would choose the merchant's cheaper offer, the costs of their high-cost cards do not exceed their benefits. Yet that choice is "absolutely" precluded by Amex's provisions. *Id.* As this Court has said elsewhere, Amex is not "justified in deciding on behalf of its . . . customers that they [do] not need [this choice]." *Ind. Fed'n*, 476 U.S. at 462. And it "is not entitled to pre-empt the working of the market by deciding for itself" what is in its cardholder consumers' best interests. *Id.*

3. The Second Circuit's analysis conflicts with this Court's administrative concerns

In addition to Section 1's consumer-welfare ends, this Court's previous reliance on administrative factors weighs against the Second Circuit's "offset" test. *Pac. Bell*, 555 U.S. at 452-55. The lower court's test imposes judicial costs that this Court has rejected in other areas, and the test gives a potential pass to large amounts of anticompetitive conduct.

Start with the judicial costs. This Court has been reluctant to adopt legal rules that—by "seek[ing] to embody every economic" principle, *Barry Wright*, 724 F.2d at 234—impose "evidentiary complexities and uncertainties," *Ill. Brick*, 431 U.S. at 731-32. The Court has held, for example, that a price-fixer could not assert that plaintiff retailers passed along the price-fixer's higher prices to customers because of the

alleged difficulties in measuring the pass-on amounts. *Hanover Shoe*, 392 U.S. at 491-94. And it has rejected a price-squeeze claim—that a vertically integrated monopolist set wholesale prices to its competitors at high levels and retail prices to consumers at low levels—because it would be difficult to police the "*interaction*" between "wholesale and retail prices." *Pac. Bell*, 555 U.S. at 453.

The Second Circuit's test raises similar concerns because it requires a calculation of *two* prices. Whether Amex's anti-steering provisions help or harm cardholders would require courts to consider two pass-on amounts. On the one hand, as noted, *merchants* will pass on a portion of the higher credit-card costs to *all* of their consumers in the form of higher retail prices. Pet. App. 210a-11a. On the other, *Amex* may pass on some of its revenue from higher prices to *its* customers in the form of rewards. Frankel & Shampine, *supra*, at 634 & n.25. Examining "the *interaction* between these two" pass-on amounts could prove "difficult." *Pac. Bell*, 555 U.S. at 453. The "evidentiary complexities and uncertainties involved" would add "costs to the judicial system" that this Court has found inappropriate in other cases. *Ill. Brick*, 431 U.S. at 732.

At the least, *Amex* should bear the burden to prove that any indirect cardholder gains outweigh direct merchant losses. After all, "the burden of proof should be assigned to the party with the less plausible claim." Hovenkamp, *supra*, at 309. In that respect, this case reverses the presumptions that drove this Court's demanding test for predatory-pricing claims. The Court called mistaken liability rulings in that context "'especially costly'" because

they chilled procompetitive conduct—reducing prices to increase market share. *Brooke Grp.*, 509 U.S. at 226 (citation omitted). Here, by contrast, the anti-steering provisions are not "moving prices in the 'right' direction." *Barry Wright*, 724 F.2d at 231. They are moving prices in the "wrong" direction, as Discover's failed low-price option proves.

In addition, predatory-pricing claims rest on speculation that a price-cutting producer might seek *anticompetitive* monopoly profits later. *Brooke Grp.*, 509 U.S. at 224-26. Here, however, it is the restraint's allegedly *procompetitive* benefits that arise later—as issuers disburse revenues from the higher prices to certain cardholders. If speculative consumer harms did not warrant prohibiting concrete consumer gains in that context, speculative consumer gains should not warrant licensing concrete consumer harms in this one. The costs of false positives are high there, just as the costs of false negatives are high here, for the same reason: "'Low prices benefit consumers regardless of how those prices are set.'" *Id.* at 223, 226 (citation omitted).

4. The Second Circuit's need to create a novel market-definition test confirms its error

For these reasons, the Second Circuit wrongly required the Government to prove that the higher merchant prices caused by Amex's anti-steering provisions were not counterbalanced by more cardholder benefits—*even assuming* both are in one market. Yet the court never should have sailed into this sea of doubt because the usual market-definition test avoids the complexities. The Second Circuit fell into them by defining the "market" broadly to include

both sides of the credit-card platform. Pet. App. 31a-40a. Its analysis conflicts with this Court's *general* test to identify the relevant market, and its *specific* use of that test for multi-sided platforms.

As a *general* matter, the Second Circuit's approach departs from the test that the Court has long applied to identify whether a different product falls within the "relevant market" of the product that is at issue in the antitrust case. To decide that question, the Court has asked whether the different product is "reasonably interchangeable" with the at-issue product. *See United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *Int'l Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242, 250-51 (1959). In *NCAA*, for example, the Court concluded that the NCAA violated Section 1 by restricting the number of college football games that broadcasters could air on television. 468 U.S. at 99-120. In the process, it upheld a finding that "college football broadcasts" were a relevant market separate from other television shows because those other broadcasts were not "reasonably substitutable for televised NCAA football games." *Id.* at 111.

Here, the credit-card industry's services to *cardholders* do not meet this test because they are not "reasonably interchangeable" with the industry's different services to *merchants*. *Grinnell*, 384 U.S. at 571. If the credit-card industry raised prices on merchants, those merchants could not simply switch from the merchant services that they purchase to the cardholder services that cardholders obtain from issuers. While interrelated, the services offered to customers on one side of this platform are fundamentally different "products" from the services offered on

the other. The two services are complements, not substitutes. Areeda & Hovenkamp, *supra*, ¶ 565 (Supp. 2017).

Rather than apply the established market-definition test, the Second Circuit created a new one. Because prices in the market for merchant services *affect* prices in the market for cardholder services, the Second Circuit held that both markets should be consolidated into one for antitrust purposes. Pet. App. 39a-40a. Yet pricing in one market often affects pricing in another, but that interdependency does not collapse the two markets into one. If it did, "there [could] never be separate markets, for example, for cameras and film, computers and software, or automobiles and tires." *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 463 (1992). This case proves the point in that merchants pass on higher credit-card prices to consumers in the form of higher retail prices. Pet. App. 210a-11a. But that does not mean that the market for credit-card services should be lumped together with the market for retail goods.

The Second Circuit's market definition makes even less sense when considered from Visa or MasterCard's perspectives. Unlike Amex and Discover, they have not vertically integrated into the issuing market. In that market, Amex and Discover compete with *thousands* of banks that issue Visa and MasterCard cards. Pet. App. 81a-84a, 117a; *Visa*, 344 F.3d at 237. That this issuing market includes a separate volume metric—the amount of loans outstanding—illustrates its distinct nature. Tr. 815-17 (Hochschild/Discover). Simply because Amex, by virtue of its business model, provides different services to different customers does not mean that all of those

services should be put into the same market. Visa and MasterCard's disaggregated models show that these services *can* be provided separately, and thus that the markets should be treated as separate ones. *Kodak*, 504 U.S. at 463.

As a *specific* matter, the Second Circuit's decision departs from this Court's cases concerning multi-sided platforms. Those platforms are not new. Newspapers, which bring together readers and advertisers, predate the Sherman Act. Notably, the Court has treated the readership market as separate from the advertising market. *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 610 (1953). In *Times-Picayune*, a corporation required advertisers seeking to advertise in its "Times-Picayune" newspaper (the only morning paper in New Orleans) to advertise additionally in its "States" newspaper (an evening paper competing with another evening paper, the "Item"). *Id.* at 597-600. The United States asserted that the corporation had adopted an unlawful tying scheme by requiring those who wanted to advertise in the dominant Times-Picayune to advertise in the evening States. The district court ruled for the United States. *Id.* at 600-01.

This Court disagreed. It recognized that a newspaper "is a dual trader in separate though interdependent markets." *Id.* at 610. A newspaper "sells the paper's news and advertising content to its *readers*," and "that readership is in turn sold to the *buyers of advertising space*." *Id.* (emphases added). The case, however, "concern[ed] solely one of these markets." *Id.* The corporation did not require *readers* to purchase the States and the Times-Picayune; it required *advertisers* to do so. *Id.* The Court thus re-

versed initially because the Times-Picayune did not have a dominant position in the New Orleans *advertising* market. *Id.* at 611-12. It then held that, while *readers* distinguished between the two papers, *advertisers* would have viewed the papers as the same product—readership. *Id.* at 613. Thus, the Court ruled that the corporation had not tied two products together when assessed from the advertisers' perspective; the products were identical to them. *Id.* at 613-14; *cf. Lorain Journal Co. v. United States*, 342 U.S. 143, 154 (1951). While *Times-Picayune* involved a two-sided platform and the Court treated each side as a "separate" market, 345 U.S. at 610, the Second Circuit did not distinguish (or even cite) that case.

The Second Circuit's decision also conflicts with *NCAA*. That case involved a multi-sided platform with television broadcasters using content (like football games) to unite advertisers and viewers. 468 U.S. at 111. When affirming a market-power finding against one content provider (the NCAA), the Court relied on the *advertisers'* perspective. From their standpoint, the Court reasoned, the *viewers* (not the *football games*) were the product (just as readers were the product in *Times-Picayune*). *Id.* And football fans were a separate market from other viewers because they had unique "demographic characteristics" for which advertisers paid higher prices. *Id.* at 111-12. Only in a footnote did the Court add separately that the *games* had "unique appeal" to *viewers* too. *Id.* at 111 n.49. Under *NCAA*, Amex's restraints should be analyzed from the separate perspectives of merchants and cardholders because cardholders are part of the "product" that networks sell to merchants.

B. The District Court Factually Found That Amex's Restraints Harmed The Cardholder Side Of The Platform Too

Even if the Government were required to prove that higher industrywide merchant prices were not sufficiently "offset" by higher Amex cardholder rewards, the Second Circuit wrongly held that the Government failed to do so. The circuit court simply ignored the district court's contrary fact-findings.

To begin with, the district court found, as a fact, that Amex's restraints inflicted industrywide harm on the *cardholder* side of the credit-card platform. "Merchants facing increased credit card acceptance costs will pass most, if not all, of their additional costs along to their customers in the form of higher retail prices." Pet. App. 210a-11a. Its finding comports with substantial merchant testimony. Retailers in competitive markets must "pass those costs on to [their] customers." Tr. 1406 (Rein/Walgreens). Conversely, merchants will pass along cost *reductions* to their customers in the form of lower prices. Tr. 1278 (Kimmet/Home Depot). The district court's finding also comports with expert testimony: "So what's going to happen is prices are going to go up with the merchant for everybody." Tr. 3855 (Katz).

The Second Circuit all but ignored these higher retail prices. In a footnote, it suggested that the district court's reliance on them was "erroneous, as it fail[ed] to take into account offsetting benefits to cardholders in the form of rewards and other services." Pet. App. 49a n.52. Two problems exist with this footnote. As an initial matter, only some retail consumers (Amex cardholders) receive the offsetting

benefits that all consumers pay for through higher prices. This "externality," which the Second Circuit overlooked, harms many others on the cardholder side of the market. *Id.* at 212a.

Additionally, contrary to the Second Circuit's claim, *id.* at 49a n.52, the district court did "take into account" cardholder rewards. The district court found—again, as a fact—that Amex's higher prices from its Value Recapture initiatives "were not wholly offset by additional rewards expenditures or otherwise passed through to cardholders, and *resulted in a higher net price.*" *Id.* at 209a (emphasis added). Amex itself noted that it drops part of its price premium to its "bottom line" rather than investing it in cardholder benefits. *Id.*; *id.* at 166a-67a. In fact, Amex's "rewards payments [were] well less than half of" its merchant prices. Tr. 3853 (Katz). Even the Second Circuit *conceded* that "not all of Amex's gains from increased merchant fees are passed along to cardholders in the form of rewards." Pet. App. 51a.

In sum, the Government met its burden to show consumer harm because it proved that Amex's anti-steering provisions raised the merchant prices of all four networks by blocking their competition over those prices. And, if the Government needed to prove a higher two-sided price that considered cardholder rewards, it met that burden too.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
*Counsel of Record
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor
HANNAH C. WILSON
Deputy Solicitor
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@
ohioattorneygeneral.gov

Counsel for Petitioner
State of Ohio

DECEMBER 2017

ADDITIONAL COUNSEL

GEORGE JEPSEN
Attorney General
State of Connecticut

LAWRENCE G. WASDEN
Attorney General
State of Idaho

LISA MADIGAN
Attorney General
State of Illinois

TOM MILLER
Attorney General
State of Iowa

BRIAN E. FROSH
Attorney General
State of Maryland

BILL SCHUETTE
Attorney General
State of Michigan

TIM FOX
Attorney General
State of Montana

DOUGLAS J. PETERSON
Attorney General
State of Nebraska

PETER KILMARTIN
Attorney General
State of Rhode Island

HERBERT H. SLATERY III
Attorney General
State of Tennessee

KEN PAXTON
Attorney General
State of Texas

SEAN D. REYES
Attorney General
State of Utah

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont

No. 16-1454

IN THE
Supreme Court of the United States

STATE OF OHIO, ET AL.,
Petitioners,

v.

AMERICAN EXPRESS COMPANY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS AMERICAN EXPRESS COMPANY AND AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.

MICHAEL K. KELLOGG
AARON M. PANNER
DEREK T. HO
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

BENJAMIN J. HORWICH
JUSTIN P. RAPHAEL
MUNGER, TOLLES & OLSON LLP
560 Mission Street
San Francisco, CA 94105
(415) 512-4000

EVAN R. CHESLER
Counsel of Record
PETER T. BARBUR
KEVIN J. ORSINI
RORY A. LERARIS
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
(echesler@cravath.com)

LAUREEN E. SEEGER
MARK CALIFANO
SUZANNE E. WACHSSTOCK
AMERICAN EXPRESS COMPANY
200 Vesey Street
New York, NY 10080

January 16, 2018

QUESTION PRESENTED

Whether Section 1 of the Sherman Act condemns a vertical restraint in a case where the defendant lacks market power and the plaintiff fails to offer evidence of reduced output or supracompetitive prices in the affected market.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, respondents American Express Company and American Express Travel Related Services Company, Inc. state the following:

American Express Company is the parent company of American Express Travel Related Services Company, Inc., and American Express Company is a publicly held company. Berkshire Hathaway Inc., a publicly held corporation, owns more than 10% of the outstanding shares of American Express Company.

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INTRODUCTION

Amex offers consumers a premium credit card with generous benefits. Those benefits are funded by transaction fees paid by merchants. Merchants do not have to accept the Amex card, and many merchants that process billions of dollars of transactions annually do not. Those that do, however, benefit from the investments Amex has made to promote use of its card by consumers who spend more, on average, than other cardholders. In exchange, Amex obligates accepting merchants not to discriminate against Amex cards by discouraging cardholders from using Amex at the point of purchase.

For decades, these nondiscrimination provisions have enabled Amex to innovate and compete effectively against the dominant payment networks. The result has been intense competition among credit cards, leading to an explosion of output fueled by increased consumer benefits.

Plaintiffs ask the Court to disrupt this thriving market by holding that Amex's nondiscrimination provisions are unlawful under Section 1 of the Sherman Act. But this Court has not affirmed the imposition of liability under Section 1 based on a vertical restraint in decades, and for good reason. Unlike horizontal agreements among competitors, vertical agreements between firms at different levels of the chain of distribution or production are not only essential to commerce but also presumptively procompetitive. Absent horizontal collusion – which is not alleged here – an actor without market power imposes a vertical restraint for only one reason: to compete more effectively.

Plaintiffs failed to meet their burden of proving that Amex's nondiscrimination provisions harmed competition. In a ruling that they do not challenge, the Second Circuit held that they failed to prove that Amex has market power. If a firm lacks market power – the power to reduce market-wide output by curtailing its own supply – it cannot harm competition through a vertical restraint. If the firm tries to reduce output, other firms will pick up any slack. As the Second Circuit properly concluded, that is the case with Amex, which has only one quarter of U.S. credit card transaction volume, less than 10% of credit cards in circulation, and one-third fewer merchants accepting its cards compared to competing networks. Amex's lack of market power is a sufficient basis to affirm.

Plaintiffs contend that they can skip any showing of market power by proving "directly" that a vertical restraint has anticompetitive effects. This case illustrates why Plaintiffs' argument is a throwback to an era when vertical restraints were routinely (and wrongly) condemned. In the absence of market power, vertical restraints do not restrain output because they leave rivals free to compete. Yet subjecting such restraints to further scrutiny risks erroneous decisions that will deter procompetitive conduct and harm consumers.

Plaintiffs' attempt to bypass Amex's lack of market power is even more troubling given that they also advocate a standard for direct effects that imposes no meaningful limits on potential liability. It would allow a plaintiff to prevail simply by showing that a vertical restraint interferes with the "competitive process." Plaintiffs have little choice but to urge this

diminished standard because their direct proof of competitive harm was fundamentally deficient, as the Second Circuit correctly recognized.

To demonstrate anticompetitive effects from the nondiscrimination provisions, Plaintiffs had to show reduced output or quality and/or supracompetitive pricing. Plaintiffs made no effort to show that Amex had reduced the quality or quantity of credit card transactions. Indeed, they conceded that output had exploded and that quality has been increasing.

Instead, Plaintiffs relied exclusively on supposed evidence of price increases. But that evidence does not show competitive harm; it is perfectly consistent with vibrant competition. First, Plaintiffs' evidence related solely to prices *to merchants*, when Plaintiffs acknowledge that a credit card transaction – the relevant measure of output – involves simultaneous consumption by merchants *and cardholders*. Merchant prices in isolation thus are not an accurate proxy for output and the competitive health of the market. Second, even if merchant prices in isolation were relevant, the pricing evidence that formed the basis of the district court's decision did not correspond to the market definition the district court adopted. Third, even setting all that aside, evidence of increased prices is not equivalent to proof of supracompetitive prices – pricing above marginal cost – which Plaintiffs concededly lack. Price increases are consistent with increasing costs to Amex from serving cardholders and merchants. A rule that ignores the costs of doing business would punish firms like Amex for providing superior products.

None of these deficiencies can be overcome by Plaintiffs' complaints about alleged distortion of the "competitive process." Those arguments rely on this

Court's cases involving "quick look" analysis applicable only to *horizontal* restraints – a red flag that Plaintiffs are trying to cut evidentiary corners. And allowing Plaintiffs to satisfy their burden by substituting economic generalities for actual proof of market harm will open the door wide to meritless litigation and mistaken condemnation of vertical restraints that enhance competition – all to the detriment of consumers and the U.S. economy.

In short, Plaintiffs have failed to show market power; they have failed to prove anticompetitive effects; and they ask this Court to elide the settled distinction between horizontal and vertical restraints. To interfere with the nondiscrimination provisions under Plaintiffs' amorphous legal standard would risk draining the market of vibrancy and innovation that has brought enormous benefit to consumers. This Court should decline that invitation and affirm.

STATEMENT

A. Factual Background

1. The Credit Card Industry Is Characterized by Intense Competition

The market for general-use credit and charge cards – for simplicity, "credit cards" – is characterized by vigorous competition among four major competitors. Measured by transaction volume, which all parties agree is the proper measure of output, as of 2013 (the year Amex's market share peaked), Visa accounted for 45% of all credit card volume, followed by Amex (26.4%), MasterCard (23.3%), and Discover (5.3%). *See* App. 13a. In that same timeframe, Visa and MasterCard together accounted for more than 432 million cards in circulation in the United States as compared to the 53 million Amex cards in circulation. *See* E.D.N.Y. Dkt. 447-1, ¶ 18.

Industry output has increased dramatically while Amex's nondiscrimination provisions have been in place. *See* App. 52a-53a. That output explosion has been driven by intense competition for both acceptance by merchants and spending by cardholders. *See generally* Tr. 6393:22-6395:4 (describing the various "channels of competition that exist today," including competition to attract consumers to use particular cards, competition for "corporate accounts," "competition for co-brand partnerships," and "competition for merchant acceptance"). Both merchants and cardholders have benefited from the superior value created by that intense competition. *See, e.g.*, App. 52a (describing cardholder benefits); Tr. 417:16-418:17, 1312:5-1313:4 (describing merchant benefits such as "building business" and signing bonuses).

Amex has led the industry in providing innovative cardholder and merchant services. On the cardholder side, Amex's signature Membership Rewards program provides cardholders with economic rewards for using the card (for example, airline miles or points redeemable for goods and services), as well as other valuable benefits (such as cash back, fraud protection, extended warranties, and purchase and return protection). *See* App. 16a, 18a, 89a. Amex's innovation also has resulted in greater "financial inclusion" in the credit card market. Tr. 4318:20-4320:23. For example, Amex's Blue Bird co-branded Walmart card is a "completely free product" that provides banking and card-payment services to those without a bank – in particular, people "in poor communities where traditional banks don't want to serve them." Tr. 3722:10-3723:14; *see also* Tr. 4318:16-25 ("70 million Americans . . . are unbanked").

On the merchant side, Amex has developed innovative data-analysis tools "to deliver marketing and data analytics services to merchants that its competitors cannot match." App. 88a. Merchants value those analytics for targeted advertising, geographic expansion, and other business strategies. *See id.*; *see also, e.g.*, Tr. 5530:10-5540:24 (describing merchant's use of Amex's data analytics to determine "the viability of . . . new [store] location[s]"). Amex also provides unique marketing opportunities for merchants. For example, Amex's "Small Business Saturday" and "Shop Small" programs have successfully provided financial incentives for cardholders to spend at small businesses. Tr. 5279:22-5280:10, 5704:13-5708:14.

2. Credit Card Networks Are Two-Sided Platforms with "Multihoming" on Both Sides

a. Credit card networks are referred to as "two-sided" platforms because their core service is bringing together merchants and cardholders to engage in a single transaction. *See* App. 77a (card networks compete for "two separate yet interrelated groups of customers who . . . rely on [their chosen] platform to intermediate some type of interaction between them"); Tr. 6056:12-15 ("It's extremely important to understand that there are two sides of the coin that [card-payment companies] serve every day. The first one is the customer, the Cardmember; and the second one is the merchant."). Without a merchant that accepts the card and a customer willing to use the card at the point of sale, no transaction will be consummated. *See* App. 118a, 185a (calling cardholder and merchant demand "inextricably linked" and "intertwined").

Credit card platforms are often referred to as "simultaneous" two-sided platforms because they exhibit a special quality not found in many other two-sided

platforms. *See* App. 78a. A credit card transaction cannot occur unless a merchant and a cardholder jointly and simultaneously decide to use the network's services. With respect to the consummation of a transaction, the card networks' provision of service to the merchant is inseparable from the provision of service to the cardholder. *See id.* ("for every unit of payment services sold to the cardholder at the moment of purchase, a matching service is sold to the merchant in order to execute the transaction, and vice versa").

Likewise, the price charged by card networks for completing a transaction is "two-sided," consisting of a positive price to merchants – known as the merchant discount or fee (and usually calculated as a percentage of the cardholder's purchase amount) – and a "negative" price to cardholders, who receive rewards and other valuable benefits for using their cards. *See* App. 9a, 14a-15a; App. 16a (describing the "numerous" benefits Amex provides to cardholders). The fees paid by merchants fund the incentives paid to cardholders to encourage card use. *See* App. 50a.

b. "[C]ardholders benefit from holding a card only if that card is accepted by a wide range of merchants, and merchants benefit from accepting a card only if a sufficient number of cardholders use it" to make a purchase – a phenomenon known as "network effects." App. 8a. "[N]etwork effects exist when the number of agents or the quantity of services bought on one side of a two-sided platform affects the value that an agent on the other side of the platform can realize." App. 79a (citing, *inter alia*, David S. Evans & Richard Schmalensee, *The Industrial Organization of Markets with Two-Sided Platforms*, 3 Competition Pol'y Int'l 151, 151-52 (2007)).

Because "merchants' demand for payment card acceptance is largely derived from consumers' demand for payment card usage," providing incentives for cardholder usage of a network's card enhances the network's value to merchants. App. 81a; *see also, e.g.*, Tr. 2630:21-25 (benefits that give cardmembers incentives to use a particular card "turn into benefits for the merchants" accepting that card "because these cardmembers are now more incentivized to go and spend at the merchants on the network"). The merchant fee thus funds the rewards and other benefits that give cardholders incentives to carry and use their cards, which in turn creates greater value to merchants. *See* App. 39a (discussing the "feedback effect" between merchant and cardholder sides of the platform).

c. Both the merchant and cardholder sides of the credit card platform are characterized by "multihoming": virtually all merchants accept more than one network's cards, and most cardholders carry more than one type of credit card. *See* App. 16a. Acceptance of a network – by a merchant or a cardholder – does not by itself result in any transactions. Rather, a transaction requires a further decision by a cardholder at the "point of sale" to use one network's card – and not a rival's card – to consummate the transaction. For example, if a cardholder carries Visa, MasterCard, and Amex cards, and the merchant accepts all three, the cardholder's choice of which card to use will determine which network has successfully competed for that transaction. *See* App. 16a-17a.

3. The Nondiscrimination Provisions Are Vertical Restraints That the Credit Card Networks Independently Implemented To Enhance Interbrand Competition

Because of the network effects between the cardholder and merchant sides of the platform, a credit card network must balance prices and other terms of dealing on both sides of the market. Finding an optimal balance maximizes the value of the network's services to both cardholders and merchants, and thus enhances the network's ability to compete effectively against its rivals. *See* App. 9a; *see also* Tr. 2886:5-10 ("[W]e invest an awful lot in our card . . . products, we invest a lot in our merchant business, we're constantly trying to strike the right balance and ensure that both constituents are seeing the value in doing business with American Express.").

Yet "[t]his can be a difficult task since cardholders' and merchants' respective interests are often in tension: merchants prefer lower network fees, but cardholders desire better services, benefits, and rewards that are ultimately funded by those fees." App. 9a. Although merchants benefit from networks' investment in cardholder rewards and other benefits, *see supra* p. 8, merchants would (obviously) prefer to pay lower discount rates. One way merchants historically sought to do so was to dissuade cardholders from using their chosen card at the point of sale – a practice known as "steering." *See* App. 18a-19a.

Merchant steering has several harmful effects. *See* App. 21a. First, merchant steering directly undermines Amex's efforts to promote "welcome acceptance" – "a frictionless and consistent point-of-sale experience" – which is critical to the relationship of trust between Amex and its cardholders. *Id.*; *see* Tr.

4633:16-24 (Amex CEO's testimony that "[w]elcome acceptance" was and is the "cornerstone of trust"). Such an effect is particularly corrosive, because a negative experience using Amex makes the cardholder less likely to use the card for subsequent transactions. Second, merchant steering undermines the investment that Amex makes – through Membership Rewards and other benefits – to encourage its cardholders to use Amex rather than one of the other cards that almost all Amex cardholders also carry. Merchant steering thus "interferes with a network's ability to balance its two-sided net price." App. 21a.

To prevent the harmful effects of merchant steering, Amex implemented "anti-steering" policies, or "nondiscrimination provisions," in its agreements with merchants. App. 19a-21a. Amex has had nondiscrimination provisions in its merchant agreements since the 1950s. *See* App. 19a. Under those provisions, if a merchant chooses to accept Amex, it agrees not to engage in specified conduct that attempts to dissuade cardholders from using their card of choice. *See* App. 19a-20a (describing Amex's current nondiscrimination provisions). Amex strengthened these nondiscrimination provisions in the 1990s following successful campaigns by Visa to encourage merchant steering with the goal of undermining "welcome acceptance." App. 19a, 21a. Those campaigns were designed not to improve Visa's competitive offering but rather to weaken Amex by destroying its ability to attract cardholders by providing rewards and services those cardholders valued. *See* C.A. App. 1257 (PX0132, at 0003930) (describing campaign as designed to undermine Amex's strategy of investing merchant fees in "advertising, systems and services," thereby "breaking [Amex's] success cycle").

By the time this suit was filed, Visa, MasterCard, and Discover had independently implemented their own nondiscrimination provisions. *See* App. 22a; Tr. 926:6-15.

4. Amex's Differentiated Business Model Provides a Vital Competitive Check on Visa and MasterCard

Amex's nondiscrimination provisions – and the "welcome acceptance" they ensure its cardholders – are critical to Amex's ability to provide cardholder benefits, differentiate its business model, and compete effectively with Visa and MasterCard, which have entrenched structural advantages.

a. Visa's and MasterCard's market dominance is rooted in their historical structure. Both emerged in the mid-1960s as "open-loop," joint-venture bank associations whose member banks issued Visa- or MasterCard-branded cards to their retail banking customers, contracted with merchants to accept payment cards, or both. App. 12a-13a, 85a n.5. "Issuing banks" have relationships with cardholders, issuing them cards and billing them for their purchases. "Acquiring banks" have relationships with merchants, paying for cardholder purchases (less the merchant fee or discount) and obtaining payment from the issuing bank (less the applicable "interchange" fee). *See* App. 5a-6a, 13a. The acquiring bank also pays a "network fee" to Visa or MasterCard. *See* App. 56a. Although similar cooperative bank associations came into existence during the same period, Visa and MasterCard soon became "the two national associations that '[j]ust about every bank in the card field' became 'convinced' they must join." App. 12a (quoting David S. Evans & Rich-

ard Schmalensee, *More than Money, in Platform Economics: Essays on Multi-Sided Businesses* 282, 290 (David S. Evans ed., 2011)) (alteration in original).

Visa and MasterCard maintained their joint-venture status until 2006 and 2008, when first Visa and then MasterCard "converted ... into single-entity, publicly traded companies with no bank governance." App. 85a n.5. But, even following this change, Visa and MasterCard continued to operate as "cooperative," "open-loop," or "umbrella" networks of "issuing" and "acquiring" banks. App. 5a-6a, 13a.

Amex, in contrast, operates a different business model – one that is "unique in the industry." App. 87a. It relies on a "closed-loop" network, meaning that the company has direct relationships with nearly all Amex cardholders and Amex-accepting merchants. App. 14a-15a. Amex did not start out as a bank association and, to this day, few Amex cards are issued by third-party banks.[1] Rather, Amex itself typically provides card-issuing services to cardholders and acquiring and processing services to merchants, as well as the network services necessary to facilitate transactions between the two. *See* App. 15a.

Visa and MasterCard continue to have significant structural advantages over Amex – most important, ubiquity among both cardholders and merchants. If a retail customer of a bank wants a credit card, the fact that "[j]ust about every bank in the card field" is in the

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[1] For many years, Visa and MasterCard unlawfully barred member banks from issuing Amex (or Discover) cards. *See United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003) (affirming the invalidation of these "exclusionary rules" as anti-competitive horizontal restraints). In recent years, Amex has contracted with a very limited number of third-party U.S. banks to act as issuers. *See* App. 85a.

Visa and MasterCard networks makes issuance of a Visa or MasterCard nearly inevitable. App. 12a (alteration in original); *see* Tr. 4329:21-25 ("The reality is that Visa and MasterCard . . . ha[ve] access to all the banks, channels and capabilities. So you open up a checking account, you got a card.").

The ubiquity of Visa and MasterCard cardholders also means that Visa and MasterCard are accepted by virtually every card-accepting merchant in the United States. *See* App. 17a. In contrast, the district court found that "[a]pproximately three million of the total nine million U.S. merchant locations that accept credit cards – that is, roughly one out of every three – do not accept Amex cards." App. 17a, 85a; *see* Tr. 3398:18-3399:20 (describing Visa and MasterCard commercials highlighting merchants that "don't take American Express").

In addition, the vast majority of Amex cardholders carry a Visa or MasterCard, while only a relatively small number of Visa and MasterCard cardholders also carry an Amex card. *See* Tr. 3686:6-20. Thus, "when compared to the ubiquity enjoyed by Visa and MasterCard," Amex "may be fairly characterized as a discretionary card." App. 159a.

Given Visa's and MasterCard's dominant positions in the market, Amex must compete fiercely for both merchant acceptance and cardholder loyalty – a loyalty that would rapidly "dissipate" if Amex were to offer lower value to cardholders than its rivals do. App. 46a; *see also* Tr. 6373:4-7 ("[c]ustomers can be stolen away from Amex, and any loyalty has to be re-earned constantly by delivering value to customers"); Tr. 4162:6-18.

b. Amex's business model is also differentiated in another critical way. "Unlike Visa and MasterCard,

which run 'lend-centric' models deriving more than half their revenues from interest charged to cardholders for unpaid balances on the cardholder's charges for a given billing period, Amex runs a 'spend-centric' model whose revenues are primarily dependent on merchant-discount fees." App. 16a. "This model is critical to Amex's merchant value proposition, which is that merchants who accept Amex gain access to 'marquee' cardholders who tend to spend more on both an annual and per-transaction basis than customers using alternative payment methods." *Id.*; *see* App. 176a-177a (finding that Amex "does, in fact, deliver on its differentiated value proposition to merchants in many respects"). "Amex's model is also critical to its cardholder value proposition," because the merchant fees fund the rewards Amex provides to cardholders to use their Amex cards. App. 16a.

Amex's spend-centric business model has spurred greater innovation and product choice in the market. "Beginning around 2006, for example, both Visa and MasterCard introduced new premium card categories . . . to enable issuers to more effectively compete with Amex's high-reward products." App. 179a. As a result of this competition, "industry-wide transaction volume has substantially *increased* and card services have significantly *improved* in quality." App. 52a.

B. Proceedings Below

1. On October 4, 2010, the United States, eventually joined by petitioners (collectively, "Plaintiffs"), sued Amex, Visa, and MasterCard, alleging that the nondiscrimination provisions in each network's merchant agreements unreasonably restrained trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Visa and MasterCard (which face little risk of having their cardholders steered to Amex, which most

of those cardholders do not carry) entered into a consent judgment in 2011 and rescinded their nondiscrimination provisions, while Amex proceeded to trial.

Following a bench trial, the district court held that Amex's nondiscrimination provisions violate Section 1. The court recognized that the nondiscrimination provisions are vertical non-price restraints subject to rule-of-reason scrutiny. App. 105a-106a. Under the three-part burden-shifting framework used by the Second Circuit, Plaintiffs bore "an initial burden of demonstrating that the challenged restraints have had an 'adverse effect on competition as a whole in the relevant market.'" App. 108a. The district court reasoned that Plaintiffs could discharge that burden either: (1) by proving that Amex has market power in a properly defined market and showing that there are "other grounds" to believe that the nondiscrimination provisions will cause competitive harm, or (2) by showing "directly" that the nondiscrimination provisions cause an "actual adverse effect" or harm to market-wide competition. App. 108a-109a.

The district court acknowledged that credit card networks are simultaneous two-sided platforms. App. 78a. Indeed, those findings were compelled by the trial testimony of Plaintiffs' own economic expert, Professor Katz, who agreed that "an assessment of market definition, market power and competitive effects should account for the two-sided nature of the market" and that "[i]t is critical not to draw unwarranted and misleading conclusions by focusing solely on one side of a two-sided market." JA249-50.

Nonetheless, the district court focused on the impact of the nondiscrimination provisions on merchants alone to find that Plaintiffs had satisfied their initial burden of showing an adverse effect on competition.

First, the district court defined the relevant market as "network services," the half of the two-sided platform where Amex, Visa, MasterCard, and Discover compete for merchant acceptance. App. 114a-118a. It excluded cardholders from the relevant market because doing so would go "too far" and "frustrate" the analysis of anticompetitive effects. App. 116a-118a, 122a.

Second, the district court concluded that Amex had market power by analyzing the effects of Amex cardholder loyalty and Amex pricing changes on merchants only. While the court recognized that "Amex's market share alone likely would not suffice to prove market power," it nonetheless found that Amex enjoyed a more significant position in the market than its share would suggest due to "cardholder insistence" – meaning consumer loyalty that could cause some Amex cardholders not to shop, or to spend less, at a merchant that chose not to accept Amex. App. 156a. While it recognized that such insistence would "dissipate" the moment Amex stopped offering robust cardholder benefits, the court rejected the notion that cardholder loyalty was not "durable," citing "high barriers to entry in the network services market." App. 164a-165a.

The district court next pointed to evidence that Amex had increased merchant fees to certain merchants without significant merchant defection. App. 165a-169a. In determining that Amex's prices had increased, the court declined to take into consideration the cost to Amex of cardholder rewards or other cardholder investments, which the government failed to prove. App. 182a-184a.

Third, the district court held that Plaintiffs had directly demonstrated anticompetitive effects, confining

its analysis again to the nondiscrimination provisions' effects on merchants. App. 194a-203a. The court conceded there was no "empirical evidence that the [nondiscrimination provisions] have resulted in a higher two-sided price – i.e., that the price charged across Amex's entire platform, accounting for both [merchant] discount revenue and the expense of providing cardholder rewards, increased as a result of the network's anti-steering rules." App. 209a. The court nonetheless concluded that, because "these restraints have resulted in higher all-in *merchant* prices across the network services market," Plaintiffs had shown "proof of their actual anticompetitive effect." App. 207a (emphasis added).

The district court acknowledged both that there was no reliable evidence of Amex's profit margins, App. 172a-173a, and that there was an "absence of clarity with respect to whether Amex maintains a premium in today's market and whether such premium is or has been justified by the network's differentiated value propositions," App. 180a. The court nevertheless determined that Amex's prices are "supracompetitive." App. 207a-212a. The court placed no weight on the fact that Amex's (and other networks') purported price increases occurred during a time when transaction output surged and costs increased due to "ever more robust suites of rewards and other ancillary [cardholder] benefits." App. 238a.

2. The Second Circuit unanimously reversed. It held that, accepting the district court's factual findings, Amex was entitled to judgment as a matter of law because Plaintiffs failed to carry their burden to show harm to competition. As the court of appeals explained, the district court's fundamental error was excluding cardholders from its analysis.

The court reasoned that limiting the relevant market *to merchants* failed to "consider the feedback effects inherent on the platform by accounting for the reduction in cardholders' demand for cards (or card transactions) that would accompany any degree of merchant attrition" in response to a price increase. App. 39a. The district court's market definition also failed to take into account the "commercial realities" of the market, including the joint and simultaneous nature of cardholder and merchant demand. App. 32a-35a. "Separating the two markets here – analyzing the effect of Amex's vertical restraints on the market for network services while ignoring their effect on the market for general purpose cards – ignores the two markets' interdependence" and "allows legitimate competitive activities in the market for general purposes to be penalized no matter how output-expanding such activities may be." App. 34a-35a.

The Second Circuit also disagreed with the district court's conclusions that Amex possessed sufficient market power to affect competition adversely in the relevant market and that the nondiscrimination provisions had an actual adverse effect on competition. As to market power, the Second Circuit held that, in relying on evidence of increases in merchant fees as a basis for its finding of market power, the district court had ignored the costs Amex incurred to build the value of its network. "The District Court erred . . . by failing to recognize that increased demand on the cardholder side of the platform expands value on the merchant side. In other words, the District Court did not acknowledge that increases in merchant fees are a concomitant of a successful investment in creating output and value." App. 43a.

The Second Circuit also held that cardholder insistence fails to form a source of market power because, as the district court's findings made clear, Amex cardholder loyalty simply reflects "competitive benefits on the cardholder side of the platform and the concomitant competitive benefits to merchants who choose to accept Amex cards." App. 45a. That Amex must constantly compete to offer "robust rewards programs" and other benefits to cardholders – that other networks can and do attempt to replicate – "indicates, if anything, a *lack* of market power." App. 46a. Moreover, concluding that cardholder insistence prevents merchants from dropping Amex ignores the finding that nearly one-third of credit card-accepting merchants do not accept Amex. App. 46a-48a.

As to anticompetitive harm, the Second Circuit held that the district court "erroneously elevated the interests of merchants above those of cardholders" by finding that Plaintiffs had carried their burden to show competitive harm without proving the impact of the nondiscrimination provisions on "the two-sided net price [that] account[s] for the effects of the [nondiscrimination provisions] on both merchants and cardholders." App. 49a. Applying the correct legal standard to the record, Plaintiffs' proof failed as a matter of law to establish that the nondiscrimination provisions adversely affect competition among credit card networks – particularly given the lack of evidence of Amex's two-sided price or profit margins, and the undisputed evidence of increasing output and higher-quality cardholder benefits. App. 49a-53a. The court also noted that, even as to the prices charged to merchants, the government never attempted to prove the price of its proposed relevant product: "network

services" provided to merchants. Instead, the government attempted to show competitive effects through evidence concerning the full merchant discount rate, which covers a broader bundle of services, not simply fees associated with network services. App. 37a-38a n.45.

"One of the ironies of this case," the Second Circuit pointed out, "is that the government, which usually worries about oligopolists engaging in indirect collusion leading to pricing similarities, seeks relief . . . that might drive the three cards to greater similarities," which "could . . . increase market concentration by reducing Amex's share to Visa's and MasterCard's benefit." App. 48a-49a n.51.

The Second Circuit denied Plaintiffs' petition for rehearing en banc without any dissent and without requesting a response.

SUMMARY OF ARGUMENT

At trial, Plaintiffs sought to show anticompetitive harm under the rule of reason both indirectly, by showing market power and grounds for believing the challenged restraint could harm competition, and directly, by showing actual adverse effects on competition. Petitioners do not challenge the Second Circuit's holding that Plaintiffs' proof of market power was inadequate; they contend only that they directly proved actual adverse effects on competition. Plaintiffs further argue that they can meet that burden simply by showing that a vertical restraint disrupts the "competitive process."

This Court should affirm on either of two grounds. First, this Court should hold that a vertical restraint cannot be condemned as an unlawful restraint of trade under the rule of reason if the defendant lacks market power, as Amex does. Second, alternatively, it should

affirm the Second Circuit's correct conclusion that Plaintiffs failed to demonstrate direct anticompetitive harm under the proper standard, which requires actual proof of reduced output, reduced quality, and/or supracompetitive prices.

I.A. This Court's precedents draw a basic distinction between horizontal and vertical restraints. Agreements between competitors reduce the intensity of rivalry that is critical to competition. Vertical restraints – though sometimes disliked by distributors whose freedom is constrained – promote the interests of consumers by allowing a producer to compete more effectively against its rivals, thus intensifying interbrand competition. Accordingly, restraints that were once condemned as *per se* unlawful now are recognized as benign, at least in the absence of market power.

B. The nondiscrimination provisions at issue here are a classic vertical restraint that intensifies interbrand competition. It is perfectly reasonable for Amex to insist, as a condition of dealing, that a merchant stand behind Amex's cards at the very moment a customer chooses which card to use, rather than advocate for rival networks in service of the merchant's own short-term self-interest. The challenged restraints enhance Amex's efforts to promote a superior product that can compete against its powerful and ubiquitous rivals. Conversely, merchant steering thwarts those competitive efforts by undermining card networks' investment in the rewards and other benefits that make cards attractive to consumers.

C. This Court should hold that, when a defendant lacks market power, as Amex does here, a vertical restraint such as the nondiscrimination provisions cannot be condemned under the rule of reason. A firm with market power – the power to reduce market-wide

output by curtailing its own supply – can harm consumers because it can deprive some of them of desired supply and increase prices for the rest. But, if a firm lacks such power, curtailing supply unilaterally will simply result in a loss of market share, because other suppliers will fill the gap.

A firm that lacks market power cannot harm competition through a vertical restraint because such restraints leave rivals free to meet market demand. In cases challenging vertical restraints, permitting a plaintiff to dispense with a showing of market power will erroneously subject firms to treble damages and the high costs of litigation, deterring innovation that benefits consumers.

D. As the Second Circuit correctly determined, Amex – which accounts for only 26% of credit card transaction volume and only 10% of cards in circulation – lacks market power. Plaintiffs have not challenged that holding, and the district court's reasons for reaching a contrary conclusion were incorrect. Neither the fact that Amex is broadly accepted nor the fact that certain cardholders prefer to use Amex over other cards suggests that Amex has any ability to constrain market-wide output. And there was no evidence that Amex had any ability to impose price increases not justified by the cost and quality of the service provided.

II.A. The Second Circuit's holding that Plaintiffs failed to demonstrate harm to competition is also correct.

The quantity and quality of output in the market for credit card services have increased sharply while the nondiscrimination provisions have been in effect – sure signs of the market's competitive health. Petitioners' effort to rely instead on alleged increases in

prices charged to merchants as evidence of anticompetitive effects failed for several reasons. Most fundamentally, given the unusual, two-sided nature of the market – each credit card transaction is jointly and simultaneously consumed by a merchant and a cardholder – merchant prices in isolation do not provide an accurate proxy for output. Moreover, the all-in merchant discount is not a measure of the price of "network services" – the "product" in the market that Plaintiffs say was affected. And, just as important, evidence about prices alone – in the absence of evidence of costs and margins – cannot show anticompetitive effects.

B. Plaintiffs suggest that the rule-of-reason standard should be relaxed in this case because the challenged restraints purportedly restrict "the competitive process." But that argument – premised entirely on cases involving abbreviated "quick look" analysis of *horizontal* restraints – ignores the fundamental difference between a competition-limiting agreement between competitors and a competition-intensifying vertical agreement. Moreover, Plaintiffs' standard offers no guidance to courts – or to businesses – for determining when vertical restraints offend the antitrust laws. Many vertical restraints restrict some facet of interbrand competition, but, in the absence of market power, the antitrust laws rely on competition – not court-imposed regulation – to promote consumer welfare.

ARGUMENT

I. AMEX'S LACK OF MARKET POWER IN THE CREDIT CARD MARKET PRECLUDES LIABILITY

This Court should affirm the Second Circuit's judgment on the ground that Plaintiffs failed to prove that Amex has market power, a finding that precludes the possibility that a vertical agreement unlawfully restrains trade under the rule of reason.

A. Vertical Restraints, Unlike Horizontal Agreements, Intensify Competition When Used by Firms Without Market Power

This Court's cases draw a sharp distinction between horizontal restraints – agreements among competitors – and vertical restraints – agreements among actors at different levels of a supply or distribution chain. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 888 (2007). Agreement among horizontal competitors blunts the rivalry that brings innovation and lower prices. *Cf. Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-69 (1984) (noting that "competition assumes and demands" "independent centers of decisionmaking"). Horizontal collusion is the "supreme evil of antitrust" because competitors share an interest in higher prices, which they can achieve by jointly restricting output. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

By contrast, vertical agreements – at least when imposed by firms that lack market power – raise no comparable suspicions. First, vertical agreements – unlike horizontal agreements – do not by themselves aggregate market shares or risk creating the power that market concentration may confer. *See* Herbert Hovenkamp, *The Rule of Reason*, Inst. for Law &

Econ. Research Paper No. 17-28, at 56 (July 2017) ("[A] purely vertical agreement does nothing to increase market shares."). Second, vertical agreements are ubiquitous in the economy; commerce is literally impossible without them. *See id.* at 57-58 ("[O]rdinary buy-sell and licensing agreements are an essential part of ordinary business, right down to the consumer level.").

Most fundamentally, the incentive of a manufacturer in a competitive market is to use vertical agreements to improve efficiency, so as to compete more effectively against rivals. Distributors of the firm's products or services, however, face a different incentive: to increase their own profits at the expense of both producers and consumers. *See Leegin*, 551 U.S. at 896 ("[I]n general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins."). Vertical restraints, unlike horizontal ones, do not impede interbrand rivalry; instead, they channel distributor behavior toward more effective interbrand competition. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 55 (1977) (noting, as an example, that "[e]stablished manufacturers can use" vertical restraints "to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products").

Recognizing the force of the distinction between horizontal and vertical agreements, this Court has "rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical ones." *Leegin*, 551 U.S. at 888. Until the 1970s, antitrust law embodied rules that subjected restrictions that manufacturers placed on their dealers to searching scrutiny and even *per se* condemnation.

See, e.g., United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *overruled by Continental T.V.*, 433 U.S. at 58. But, in recent decades, this Court has swept away virtually all of the *per se* rules of illegality that had once applied to vertical restraints. *See Leegin*, 551 U.S. 877 (minimum resale price maintenance); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (maximum resale price maintenance); *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988) (all non-price vertical restraints); *Continental T.V.*, 433 U.S. 36 (territorial restrictions). This Court's recent decisions now recognize that vertical restraints – far from being subject to *per se* condemnation – are presumptively lawful. Unless a firm has market power – *i.e.*, "so long as interbrand competition exist[s]" – its vertical restraints enhance consumer welfare rather than unreasonably restrain trade. *Business Elecs.*, 485 U.S. at 725 (explaining *Continental T.V.*'s rationale).

B. Amex's Nondiscrimination Provisions Share the Procompetitive Attributes of Other Vertical Restraints

The nondiscrimination rules, like vertical restraints generally, foster more effective interbrand competition. As the district court recognized, when a retailer, after having agreed to accept Amex, discourages consumers from using it, that does not merely lead to the loss of a single transaction, but it also undermines cardholders' trust that, where Amex is accepted, it is welcomed. A negative experience using Amex discourages the cardholder from using the card in the future. *See* App. 80a. The retailer is unlikely to perceive any negative consequences from that in the short term. But the consequences for Amex, spread across millions of merchants and billions of transactions, is

to undermine the network investments that distinguish Amex from its larger and more ubiquitous rivals. By requiring Amex-accepting merchants to stand behind its brand, Amex enhances its ability to compete with rival networks, including the dominant network, Visa. And Amex's continuing ability to offer unique and differentiated value has long-term benefits for card-members and merchants alike.

The trial record establishes that the nondiscrimination rules foster intense competition for cardholder spending, fueled by consumer rewards and benefits. *See* App. 238a. Those benefits include cash back, low or zero interest on balances, travel rewards, free rental car insurance, zero transaction fees on foreign purchases – the list is limited only by the creativity and marketing savvy of competing companies. And many of those methods involve merchants – for example, a network may offer special discounts for purchases at designated merchants, including on co-branded cards. The nondiscrimination rules help to ensure that merchants do not stand in the way of Amex's efforts to provide enhanced value for credit card consumers through diverse and differentiated services, benefits, and rewards that give cardholders incentives to use their cards. *See Leegin*, 551 U.S. at 890. This increases, rather than decreases, output and demonstrates how the nondiscrimination rules intensify the card networks' "dominant incentive" to make products attractive to consumers. *Business Elecs.*, 485 U.S. at 725.

Plaintiffs – and the merchants that support them – have never taken serious issue with the conclusion that the impact of the nondiscrimination provisions on credit card users has been increased benefits, services, rewards, and competition for cardholders. Instead,

they argue that the rules are anticompetitive because *merchants* are subject to higher fees than they would be if they were able to discourage use of a particular card at the point of purchase. As an initial matter, the record contradicts the premise that the nondiscrimination provisions cause merchants to pay higher fees. Plaintiffs' expert witness acknowledged that, in the three years after Visa and MasterCard agreed not to enforce their nondiscrimination provisions, there was no evidence that merchant fees decreased for merchants that did not accept Amex cards (and thus were not subject to Amex's nondiscrimination provisions). *See* Tr. 4239:1-18, 4240:5-13. Furthermore, the same expert stated that he could not confidently predict whether, in the absence of nondiscrimination provisions, merchant fees would increase or decrease. *See* JA257-59.

Even assuming that merchant fees would be lower absent the nondiscrimination provisions, that would not distinguish the nondiscrimination provisions from other vertical restraints. As discussed above, such restrictions frequently limit distributors' freedom to maximize their own profits in the short run, in the interest of promoting the most efficient distribution of a manufacturer's product. If a credit card company determines that it can compete most effectively by giving cardholders incentives – funded by higher merchant fees – and if merchant steering would make those investments less effective, then restricting steering enhances competition. As in the case of other vertical restraints, the interests of upstream producer and consumer are aligned.

The United States asserts (at 25-26) – without analysis – that merchants are not distributors "at least in any traditional sense." But, while merchants

are (jointly with cardholders) consumers of an Amex transaction, *see* App. 74a n.4, they are also distributors in the relevant sense: the merchant stands between Amex and the cardholder making the ultimate decision whether to consume services from Amex or from a rival network. *See* App. 21a. When a merchant agrees to accept a network's cards, that acceptance alone does not generate a transaction; it merely makes Amex's credit card services available to cardholders at the point of sale – much like a retailer's agreement to carry a brand of product makes those products available for purchase by the consumer. The cardholder, not the merchant, ultimately decides which network to use. *See* U.S. Br. 26. For these reasons, Amex has a critical interest in ensuring merchants do not undermine Amex's competitive strategy.

Just as retailers seek higher profits at the expense of manufacturers and consumers, *see Leegin*, 551 U.S. at 896; *Continental T.V.*, 433 U.S. at 56, steering reflects merchants' preference for lower fees even though lower fees reduce the benefits of competition for cardholders. *See* App. 9a ("[C]ardholders' and merchants' respective interests are often in tension: merchants prefer lower network fees, but cardholders desire better services, benefits, and rewards that are ultimately funded by those fees."); *cf. Leegin*, 551 U.S. at 890 (noting retailers' motive to increase profits by free-riding). It is reasonable for a manufacturer lacking market power to insist that a distributor not discriminate against the manufacturer's products. In turn, by reducing merchant behavior that harms the value proposition of Amex's differentiated offering, the nondiscrimination provisions enhance Amex's efforts to compete against its rivals.

C. Given the Vertical Nature of the Nondiscrimination Provisions, Plaintiffs Could Not Establish Liability Absent a Showing of Market Power

The logic of this Court's cases – and the holdings of numerous lower courts – is that, when an actor without market power enters into a vertical restraint, it is for the purpose of competing more effectively, and not for the purpose of suppressing competition. Accordingly, a plaintiff challenging a vertical restraint under the rule of reason – in the absence of any claim of collusion – cannot prevail if the restraining firm lacks market power.

1. This Court has defined market power as "the ability of a single seller to raise price and restrict output," giving that seller "the power to force a purchaser to do something that he would not do in a competitive market." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 464 (1992). Every firm in a competitive market produces up to the point where the revenue from its last unit of output is equal to the marginal cost of producing it. In such a market, the marginal revenue from each additional sale is the market price, and every firm produces up to the point where its marginal cost is equal to the market price. This maximizes consumer welfare. *See* Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 702 (1975); *see also* Pet. Br. 21 (citing *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986)).

But a firm with market power, unconstrained by interbrand competition, can raise prices by reducing output because no existing or new competitors are able to take up the slack. Such a firm tends to produce

less, earning higher profits but making consumers worse off. In a competitive market, a firm thrives by giving consumers what they want. *See, e.g., NCAA v. Board of Regents*, 468 U.S. 85, 103 (1984) (restraints are "procompetitive" if they "increase sellers' aggregate output"). By contrast, a firm with market power can maximize profits by *depriving* (some) consumers of what they want. *See United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 176 (1964) ("The basic characteristic of effective competition in the economic sense is that no one seller, and no group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more.").

2. Because a firm without market power must compete to win – and keep – customers, vertical restraints imposed in a competitive market do not threaten consumer harm. Such restraints are likely to enhance a firm's profits only if they make that firm better able to stimulate and satisfy – not frustrate – market demand.

This Court's decision in *Leegin* reflects this logic. In that case, the Court reconsidered the century-old rule barring a manufacturer from requiring retailers to charge a minimum price for the manufacturer's products. *See* 551 U.S. at 887-89 (discussing *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)). The Court noted that the "justifications for vertical price restraints are similar to those for other vertical restraints," in that they help to preserve the diversity of competitive options. *Id.* at 890. At the same time, this Court found that resale price maintenance could threaten anticompetitive harm in two ways. First, such resale price maintenance could facilitate horizontal collusion among manufacturers or retailers. *See id.* at 892-93. Second, resale price

maintenance could be abused by a "powerful manufacturer or retailer" to preserve its ability to charge monopoly prices. *Id.* at 893-94.

But because a manufacturer in a competitive market has no incentive to make its product less attractive by artificially propping up retail prices, *see id.* at 896, vertical price restrictions "may not be a serious concern unless the relevant entity has market power." *Id.* at 898. Without market power, "there is less likelihood" that a manufacturer could "use the practice to keep competitors away from distribution outlets." *Id.*

3. Because a vertical restraint imposed by a single firm lacking market power cannot produce market-wide harm, a plaintiff's inability to show market power "is a good way of short-circuiting a Rule of Reason case" that otherwise would consume substantial resources and risk condemning harmless (and potentially procompetitive) activities. Richard A. Posner, *Antitrust Law* 195 n.5 (2d ed. 2001) (cited at Pet. Br. 23, 47, 48); *accord* Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135, 160 (1984) ("All three of the possibly anticompetitive manifestations of vertical arrangements can occur only if there is market power.") (cited at Pet. Br. 24, 26, 33).

The majority of the courts of appeals have stated that a market-power showing is required when applying the rule of reason. *See Eastern Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc.*, 357 F.3d 1, 5 (1st Cir. 2004) (Boudin, J.) ("Virtually always, anti-competitive effects under the rule of reason require that the arrangement or action in question create or enhance market power – meaning the power to control prices or exclude competition."); *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 709 (4th Cir. 1991)

(en banc) (Wilkinson, J.) ("Absent this market power, any restraint on trade created by the defendants' actions is unlikely to implicate section one."); *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588, 596 (7th Cir. 1984) (Posner, J.) ("Rule of Reason . . . requir[es] that the plaintiff first prove that the defendant has sufficient market power to restrain competition substantially. If not, the inquiry is at an end; the practice is lawful.") (citations omitted); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 221 (D.C. Cir. 1986) (Bork, J.) (stating that the court could "rest . . . upon the absence of market power," because, if the defendant lacked market power, its "agreement must be designed to make the conduct of their business more effective").[2]

This Court's decisions in *Indiana Federation of Dentists* and *NCAA* do not support dispensing with a showing of market power in a case challenging a vertical restraint. Both cases involved horizontal agreements closely analogous to *per se* unlawful restraints of trade: in one case, an agreement to limit the number of college football games that could be televised (a restraint on output); in the other, an agree-

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[2] *See also PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 418-19 (5th Cir. 2010) ("To allege a vertical restraint claim sufficiently, a plaintiff must plausibly allege the defendant's market power"); *Hand v. Central Transp., Inc.*, 779 F.2d 8, 11 (6th Cir. 1985) (per curiam) (stating that, under the rule of reason, "[a] defendant must have market power"); *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 316-17 (8th Cir. 1986) ("a finding of no market power precludes any need to further balance . . . competitive effects"); *Graphic Prods. Distribs., Inc. v. ITEK Corp.*, 717 F.2d 1560, 1568 (11th Cir. 1983) (noting that "a plaintiff attacking vertical restrictions [must] establish the market power of the defendant").

ment to refuse to provide insurers dental x-rays (a collective refusal to deal). In each case, this Court found that the restrictions at issue were "naked restraint[s] on price and output" and the plaintiff had documented their market-wide impact on output. *NCAA*, 468 U.S. at 110; *see Indiana Fed'n of Dentists*, 476 U.S. at 460. In the case of a vertical restraint, there is no such justification for dispensing with the market-power inquiry.

Furthermore, in each case, this Court found that the evidence established market power because the defendants effectively controlled nearly all supply in the market. *See NCAA*, 468 U.S. at 112 ("[T]he NCAA's complete control over [college football] broadcasts provides a solid basis for the District Court's conclusion that the NCAA possesses market power with respect to those broadcasts."); *Indiana Fed'n of Dentists*, 476 U.S. at 460 ("Federation dentists constituted heavy majorities of the practicing dentists and . . . as a result of the efforts of the Federation[] insurers . . . were . . . actually unable to obtain compliance with their requests for submission of x rays."). Amex has no such power.

4. Requiring a firm to have market power before a vertical restraint can be found unlawful also protects against the risk that mistaken condemnation – or burdensome litigation – will deter procompetitive agreements.

This Court has emphasized "the importance of clear rules in antitrust law." *Pacific Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 452 (2009). Petitioners themselves embrace that principle. *See* Pet. Br. 24-26. The structure of those rules should

> take account of the institutional fact that antitrust rules are court-administered rules. They

> must be clear enough for lawyers to explain them to clients. They must be administratively workable and therefore cannot always take account of every complex circumstance or qualification.

Town of Concord v. Boston Edison Co., 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.). Firms engaged in vigorous competition need assurance that they can use vertical restraints that facilitate competition against rivals without running the risk of costly antitrust litigation, treble damages, and attorney's fees. The market-power requirement broadly adopted by the lower courts "largely has succeeded in providing guidance" not only "for tribunals in applying the rule of reason," but also "for industry in predicting the consequences of their practices." M. Laurence Popofsky & Mark S. Popofsky, *Vertical Restraints in the 1990s: Is There a "Thermidorian Reaction" to the Post-*Sylvania *Orthodoxy?*, 62 Antitrust L.J. 729, 737-38 (1994).

This clarity is important because, as previously noted, vertical restraints frequently promote the interests of manufacturers and ultimate consumers over those of distributors and retailers. As a result, there will be potential plaintiffs with a strong motivation to challenge such restraints – or to lobby the government to do so – despite their procompetitive character. Thus, there would be an unacceptable risk of error if a plaintiff could prevail on a Section 1 challenge to a vertical agreement absent clear proof of the defendant's ability to exercise substantial market power by reducing output and thereby diminishing quality or increasing price. *See Trinko*, 540 U.S. at 414 ("The cost of false positives counsels against an undue expansion of [antitrust] liability."); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993) ("mistaken inferences" "chill the very conduct

the antitrust laws are designed to protect"); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) ("[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.") (alteration in original); *accord* Thomas C. Arthur, *The Costly Quest for Perfect Competition:* Kodak *and Nonstructural Market Power*, 69 N.Y.U. L. Rev. 1, 21 (1994) (calling a market-power requirement "essential to a sensible antitrust law" because it "minimizes false positive errors"); Frank H. Easterbrook, *Limits of Antitrust*, 63 Tex. L. Rev. 1, 12-13, 20-21 (1984).

D. The Second Circuit's Unchallenged Holding That Amex Lacks Market Power Is Correct

The Second Circuit held that Plaintiffs failed to adduce adequate evidence that Amex has market power. App. 40a-48a. Petitioners have not challenged that holding, *see* Pet. i, 18-25; U.S. Br. 23 n.4, and it is correct.

1. The record evidence cannot sustain a finding that Amex has market power. "The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market." *Eastman Kodak*, 504 U.S. at 464. At the time of trial, Amex accounted for only 26.4% of all credit card transaction volume. As the district court recognized, such a small share of the market "would not suffice" on its own to show that Amex has market power. App. 156a.

With such a modest market share, Amex cannot reduce market-wide output, especially because Amex's competitors are in virtually every wallet and at every register: if Amex tried to curtail supply, Visa, MasterCard, and Discover would rush to fill the gap. *See*

Penn-Olin, 378 U.S. at 176 (noting that, when markets are competitive, "rival sellers, whether existing competitors or new or potential entrants into the field, would keep [market] power in check"). No case of this Court has ever held that a firm with such a small market share has market power. And lower courts routinely agree that market shares like Amex's are insufficient to show market power.[3]

2. The district court's reasons for believing Amex possesses market power were legally inadequate. Most fundamentally, none reflects Amex's ability to control market-wide output of credit card transactions.

a. The fact that Amex has achieved acceptance by a large percentage of merchants does not prove that Amex has the power to restrict market-wide supply. Merchant acceptance, by itself, entails no guarantee that cardholders will actually use an Amex card. Discover has even greater merchant coverage than Amex, *see* App. 184a-185a, yet it cannot plausibly restrict market-wide output with its modest 5.3% share

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[3] "[S]ince *Jefferson Parish* [*Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984),] no court has inferred substantial market power from a market share below 30 percent." *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 516-17 (3d Cir. 1998) (finding lack of "sufficient market power" to support *per se* tying claim). *See also, e.g., Valley Prods. Co. v. Landmark, a Div. of Hospitality Franchise Sys., Inc.*, 128 F.3d 398, 402 n.3 (6th Cir. 1997) ("courts hav[e] repeatedly held that a 30 percent market share is insufficient to confer . . . market power"); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1403 (7th Cir. 1989) ("Cases frequently say that as a matter of law single-firm shares of 30% or less cannot establish market power."); *Northwest Power Prods., Inc. v. Omark Indus., Inc.*, 576 F.2d 83, 90-91 (5th Cir. 1978) (firm "conspicuously lack[ed]" market power with only "a 25 percent share" of the market).

of transaction volume, *see* App. 13a. Merchant acceptance still requires card networks to compete vigorously for each card swipe by "investing in those programs that make its product valuable to cardholders." App. 165a. That is why all parties have agreed throughout this litigation that the relevant unit of output is a transaction, not the number of retailers that are prepared to engage in a transaction if a cardholder desires to use a card issued on a particular network. Pet. Br. 3.

b. The Second Circuit also correctly rejected the argument that Amex cardholders' preference to use Amex's cards – labeled "cardholder insistence" – could establish market power. "Insistence" does not reflect power to restrict market-wide supply, but rather Amex's "successful investment in creating output and value," App. 43a, by fulfilling market demand.

As Plaintiffs' economist acknowledged, Amex's cardholder rewards operate as a price discount for transactions. *See* App. 45a-46a; *see also* App. 157a n.25 (Amex's "very attractive rewards program" is "the big source of insistence" for most Amex cardholders). The fact that Amex's cardholders prefer to use Amex's cards because they offer superior value compared to alternative credit cards cannot show that Amex can profitably reduce output. "A firm that can attract customer loyalty only by *reducing* its prices does not have the power to *increase* prices unilaterally." App. 45a-46a; *accord* IIB Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 501, at 111 (4th ed. 2014) ("*Antitrust Law*") ("[A] firm that can exclude rivals only by charging [a] competitive price does not have significant market power.").

Any "insistence" by Amex cardholders would evaporate if Amex eliminated the rewards and other benefits it provides to cardholders, as the district court recognized. App. 165a. Market power built on continuous investment in superior value does not create the kind of "substantial . . . and durable" market power that warrants judicial intervention. IIB *Antitrust Law* ¶ 501, at 111; *see Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 505 (1969) (a firm that takes "unique and unusual" investment risks lacks market power unless those investments result from its "unique economic advantages").

Accepting petitioners' contention that demand for a firm's products equates to power over market supply would condemn successful competition. That would disserve antitrust law's fundamental purpose of promoting robust competition and, in turn, increased output. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26 (1984) ("[Plaintiff] reli[es] on the preference of persons residing in Jefferson Parish to go to East Jefferson, the closest hospital. A preference of this kind, however, is not necessarily probative of significant market power.").

c. Evidence that Amex increased its merchant discount rates to some merchants in the late-2000s as part of its "Value Recapture" program likewise fails to demonstrate market power. This Court has warned against drawing an incorrect inference of power from mere evidence of higher prices, precisely because a firm's decision to charge higher prices does not mean the firm has restricted market-wide output. *See Brooke Grp.*, 509 U.S. at 237 ("Even in a concentrated market, the occurrence of a price increase does not in itself permit a rational inference of . . . supracompeti-

tive pricing."). Indeed, "[w]here, as here, output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand." *Id.*

Plaintiffs' expert testified that prices were already at competitive levels before they were increased. *See* App. 167a. But evidence of a price increase – even if a firm raises its prices above the prices charged by other firms – is perfectly consistent with the possibility that the firm is offering superior value that merits a comparatively higher price. The district court itself recognized that the fact that Amex "may charge a higher price to merchants than Visa and MasterCard . . . is not necessarily proof that such prices are supracompetitive; merchants may be receiving commensurate value for the higher price." App. 173a. The producer of a superior mousetrap can charge more for it.

Moreover, for reasons discussed further below, evidence that Amex's merchant discount increased is particularly uninformative absent evidence about Amex's costs – including the cost of cardholder benefits. *See* IIB *Antitrust Law* ¶ 502, at 112 (defendant's "market power is commonly defined by the excess of its profit-maximizing price above its marginal cost"); 28 Law Professors' Br. 6 (market power is "the power to profitably raise price above marginal cost"). Although the district court found that not all of the increases were offset by identical adjustments on the cardholder side, App. 166a-167a, the court admittedly had no evidence about Amex's costs, including how Amex's costs or margins changed over the relevant period, App. 42a-44a. Without evidence of excess margins and in the face of increasing quality and

sharply higher output, Plaintiffs failed to prove Amex's market power.

II. PLAINTIFFS FAILED TO MEET THEIR BURDEN OF PROVING HARM TO MARKET-WIDE COMPETITION

If the Court does not affirm on the basis of Amex's lack of market power, it should affirm on the ground that Plaintiffs failed to demonstrate actual harm to competition. To meet their burden, Plaintiffs had to show that the nondiscrimination provisions actually harmed competition, either through evidence of diminished quantity or quality of output, or through evidence of supracompetitive prices indicative of constrained output. *See Brooke Grp.*, 509 U.S. at 237 (requiring proof "that output was restricted or prices were above a competitive level"). The Second Circuit properly determined that Plaintiffs failed to make any such showing.

A. Plaintiffs Failed To Demonstrate That the Nondiscrimination Provisions Produced Anticompetitive Effects

Antitrust law's fundamental purpose is to ensure that competition generates the optimal level of output to meet demand. *See supra* p. 30; *see also* I *Antitrust Law* ¶ 100, at 3 (4th ed. 2013) ("For the economist, if all other things are equal, the best measure of competition is equilibrium output."). Thus, the purpose of Section 1 is to prohibit agreements that "restrict competition and decrease output." *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979); *see California Dental Ass'n v. FTC*, 526 U.S. 756, 776 (1999) (antitrust question was "whether the [challenged restraint] obviously tends to limit the total delivery of dental services").

Plaintiffs' effort to establish harm to competition through proof of increased merchant fees – either across the industry or for Amex in particular – fails because, in this industry, such increases provide no evidence of reduced output. *See* Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 13 (2008) ("While we often think of antitrust as troubled by high prices, it is better to think of antitrust's main concern in terms of restrictions on output. Competition is injured when a firm . . . is able to reduce output in some market, and 'output' can be measured by either quantity or innovation.").

1. Plaintiffs Introduced No Evidence of Reduced Output or Quality

The only trial evidence directly related to output demonstrated a substantial *increase* in output, consistent with robust competition.

As the district court found, and as petitioners agree, the relevant measure of output in this case is credit card transactions, measured by charge volume. *See* App. 151a-152a ("charge volume is the most direct measure of output"); Pet. Br. 3. Both sides used credit card transaction volume in calculating Amex's 26% market share. *See* App. 13a.

Plaintiffs provided no direct evidence of reduced transaction volume by any measure or against any benchmark. On the contrary, as the court of appeals noted, "industry-wide transaction volume has substantially *increased*." App. 52a. The record evidence showed "a dramatic increase in transaction volume across the entire credit-card industry" of 30% from 2008 to 2013 – including an 8% increase from 2012 to 2013 alone, indicating "a thriving market for credit-card services." *Id.*

Plaintiffs also conceded on appeal that quality has been increasing; "credit-card networks are offering more and better cardholder benefits than ever before." *Id.* Increased quality of services is the logical result of the fact that Amex (as well as competitors Visa and MasterCard) have invested billions of dollars in improving services and increasing cardholder rewards. *See id.*; Tr. 4379:1-6.

2. Plaintiffs Introduced No Evidence of Supracompetitive Prices

Plaintiffs' argument (Pet. Br. 37-40; U.S. Br. 30-31) that evidence of higher merchant fees overcomes this evidence of expanding output fails because merchant prices alone are not a proxy for market-wide output, however one defines the relevant market.

a. As the Second Circuit correctly concluded, merchant discount rates are not the appropriate measure of market price because they do not correspond to the relevant unit of output, credit card transactions. *See* App. 44a ("merchant pricing is only one half of the pertinent equation"), 49a (district court's "anticompetitive effects finding" came up short because it "failed to consider the two-sided net price").

Merchants and cardholders jointly consume – and share the costs and benefits of – that unit of output. The price paid for that unit of output is the net price they pay together. Any other measure of price leads to incorrect conclusions about output effects. As Plaintiffs' expert testified, "[i]t is critical not to draw unwarranted and misleading conclusions by focusing solely on one side of a two-sided market." JA249-50. For example, as the expert further acknowledged, a reduction in the price to the merchant – which might seem procompetitive when viewed in isolation – "can

harm consumers" by causing the network to reduce benefits to cardholders, which *reduces* output. JA256.

The district court concededly had no evidence about this net price, let alone whether the nondiscrimination provisions caused sustained net prices above the competitive level. As the court put it, "neither party has presented a reliable measure of American Express's two-sided price that appropriately accounts for the value or cost of the rewards paid to cardholders." App. 209a; *see* App. 174a n.30 ("[T]he evidentiary record does not include a reliable measure of the two-sided price charged by American Express that correctly or appropriately accounts for the network's expenses on the cardholder side of the platform."). The court thus lacked any ability to determine the price *indicative of output* – let alone whether it was supracompetitive.

As the United States acknowledges, this Court "need not resolve the market-definition question," Br. 41, to evaluate Plaintiffs' case. Even so, the Second Circuit's holding that the district court's market definition erroneously failed to account for cardholders was entirely consistent with this Court's precedents. Defining markets is not an end in itself but rather a means "to recognize competition where, in fact, competition exists." *Brown Shoe Co. v. United States*, 370 U.S. 294, 326 (1962). Given that the best indicator of robust competition is an efficient level of output, it made no sense to ignore the undisputed market reality that credit card transactions jointly consumed by merchants and cardholders are the relevant measure of output.

It likewise makes no sense to complain that the Second Circuit "never explained how the services that Amex provides to merchants are 'reasonably inter-

changeable' with the services it provides to cardholders," U.S. Br. 37. These two "services" cannot be substituted because they are two sides of the same coin; a credit card network cannot supply only the merchant side of a transaction or only the cardholder side. Put another way, Plaintiffs' market definition presupposes a product that does not exist – a credit card transaction consumed by the merchant but not the cardholder. The fact that the service Amex actually provides has merchant-facing and cardholder-facing components that are not interchangeable is irrelevant.[4]

Analyzing the "merchant services" market or the "cardholder services" market in isolation is not just analytically unsound but also likely to lead to unreliable conclusions about the impact of the challenged provisions on competition. *See, e.g.*, David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 Colum. Bus. L. Rev. 667, 695 (2005). As discussed above (at 25), *distributor* welfare is often in conflict with *consumer* welfare. The district court's decision to define a market limited to merchant services undermined the core purpose of the antitrust laws by erroneously focusing on the welfare of merchants to the exclusion of the consumers who are equally indispensable to

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[4] A single market may include non-interchangeable products if they have collective economic significance. *See, e.g., United States v. Grinnell Corp.*, 384 U.S. 563, 571-72 (1966) (rejecting argument "that the different central station services offered are so diverse that they cannot . . . be lumped together"); *accord United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 356 (1963) (recognizing that "the cluster of products . . . and services . . . denoted by the term 'commercial banking' composes a distinct line of commerce") (citation omitted).

transactional output. *See* App. 192a ("Proof of anti-competitive harm to merchants . . . is sufficient to discharge Plaintiffs' burden in this case."). So too would petitioners' suggestion (at 50-51) that a plaintiff can shift the burden to a defendant based on evidence of harm to distributors alone.

Petitioners' analogy to *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953), is inapt. That case held that the defendant newspaper lacked market power in the sale of advertising to advertisers, without considering readers. But, as the district court itself recognized, although newspapers exhibit "two-sidedness" in the sense that they receive revenue from both readers and advertisers, newspapers do not involve any joint consumption decision: readers subscribe to newspapers without purchasing advertised products, and advertisers promote their products only to some readers. App. 77a-78a. Accordingly, defining a market limited to the sale of advertising (or subscriptions) is unlikely to lead to the sorts of errors committed by the district court in this case.[5]

b. Even if a one-sided, merchant-only market definition were proper, Plaintiffs never defined or purported to measure the price for the "network services" that they claimed the merchants were consuming.

In Visa's and MasterCard's "open loop" networks, issuing banks provide cards to consumers, acquiring banks sign merchants up to accept those cards, and

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[5] *NCAA* involved vertical distribution of a product (college football television rights); the possibility that broadcast television is a two-sided platform was irrelevant to the analysis. *See* 468 U.S. at 111. The Court's market analysis simply differentiated various programming that could be televised, holding that college football was distinct enough to constitute a separate market. *Id.* at 111-12.

the Visa or MasterCard network sits in the middle, providing the network services that allow for a transaction to be processed. Amex provides each of these services in its closed-loop network. According to Plaintiffs, the relevant market in this case is limited to the services that the network provides to the merchant (usually through an acquirer in the open-loop systems) to enable the communication necessary for credit card acceptance. *See* App. 113a.

In the case of Visa or MasterCard, the overall merchant discount fee on which Plaintiffs relied here generally has three components: (1) the issuer's fee (called the interchange fee), which the issuer uses to fund cardholder incentives and rewards; (2) an acquirer fee, which is retained by the acquiring bank to cover its services to the merchant; and (3) a (relatively small) network fee that the network retains as the price of facilitating the transaction. *See* App. 83a. If, as Plaintiffs argued, the relevant market is limited to network services, then the relevant price is only this final component, the network services fee.

Plaintiffs never offered any evidence that network services fees are supracompetitive. As to Visa and MasterCard, the only evidence was a single, point-in-time snapshot of the network services fee with no evidence that the fee had changed or resulted in excess margins. Even more starkly, Plaintiffs offered no evidence at all of Amex's network services fee. Because Amex has traditionally acted as the network, the issuer, and the acquirer, the discount rate charged to merchants is not broken out into separate interchange, acquiring, and network fees and instead covers them all.

Thus, while Plaintiffs' case turns on the assertion that "prices" are supracompetitive as a result of the

nondiscrimination provisions, all of Plaintiffs' evidence with respect to price (such as it is) relates to the *wrong price*. Plaintiffs' proof all relates to the full merchant discount rate, which includes prices for distinct aspects of the credit card transaction, most of which fall outside the relevant market that Plaintiffs urged.[6]

c. Even if a one-sided, merchant-only market definition were correct, and even if the full merchant discount rate were the relevant price for assessing anticompetitive effects in that market, Plaintiffs' evidence still was insufficient because they claimed only that those rates are "too high" without providing any evidence of costs or margins.

Showing "sustained supracompetitive pricing," *Brooke Grp.*, 509 U.S. at 226, can provide evidence of competitive harm because "reduced output is the almost inevitable result of higher prices," *Fortner Enters.*, 394 U.S. at 503; *see also Brooke Grp.*, 509 U.S. at 233 ("Supracompetitive pricing entails a restriction in output."). But supracompetitive prices should not be confused with prices that have merely increased over time. "[T]he occurrence of a price increase does not in itself permit a rational inference of . . . supracompetitive pricing. Where, as here, output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand." *Id.* at 237.

The district court cited no evidence that Amex (or any other network) charged prices above costs or,

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[6] The Second Circuit recognized this error, *see* App. 37a n.45, but did not need to address its impact. This failure of proof, by itself, should have doomed the government's case and, if this Court were not to affirm outright, would have to be addressed by the court of appeals on remand.

more critically, earned supracompetitive profits. Indeed, the district court found "Plaintiffs have not provided a reliable measure of American Express's per transaction margins across its industry groups," App. 172a-173a, and nothing in the record "correctly or appropriately accounts for the network's expenses on the cardholder side of the platform," App. 174a n.30. Nor was Plaintiffs' evidence about Amex's "Value Recapture" program (*see supra* pp. 39-40) a substitute; as the Second Circuit explained, "[a] finding that not every dime of merchant fees is passed along to *cardholders* says nothing about *other* expenses that Amex faces, let alone whether its profit margin is abnormally high." App. 51a (emphases added). This Court has repeatedly discussed supracompetitive prices and a firm's ability to generate supracompetitive profits as equivalent. *See FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2234 (2013); *Brooke Grp.*, 509 U.S. at 237; *Eastman Kodak*, 504 U.S. at 475-76; *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117-19 & n.15 (1986); *Indiana Fed'n of Dentists*, 476 U.S. at 459; *Matsushita*, 475 U.S. at 593. Without such evidence, Plaintiffs could not establish that Amex's prices were supracompetitive.

The record here illustrates the perils of relying on price alone, without reference to cost, margins – and, ultimately, output. The ability of a particular competitor to charge higher prices may reflect the superior value of its product relative to alternatives. *See Leegin*, 551 U.S. at 896-97. Indeed, the district court concluded that any premium over Visa and MasterCard was at least partly "justified by the differentiated value [Amex] delivers to merchants." App. 176a. Assuming Amex charged a premium – and the district court found the evidence inconclusive – condemning

Amex on the basis of that evidence alone risks punishing Amex for successful competition. Erroneous judicial intervention in any market is problematic, but this Court should be particularly reluctant to distort competition in the credit card market, which is "among the largest, most diverse, and most complex markets of any consumer financial product."[7] *Accord* Verizon Br. 12 ("In order to avoid harming the consumer public, the Court should follow a policy of 'nonintervention' when it is unclear whether particular market activity is pro- or anti-competitive.").

3. The Unproven Claim That Credit Cards Raise Prices for Consumers Who Do Not Use Them Cannot Establish Anticompetitive Effects

Petitioners argue that the nondiscrimination provisions raise the overall price of goods, causing consumers who use other payment methods (like cash) effectively to subsidize cardholders' rewards. Pet. Br. 48-49; *see* App. 211a. The district court presumed such a subsidy without proof, but even assuming it exists, this consideration is not a basis for condemnation under the antitrust laws.

Consumers frequently bear some cost for services they do not use – not everyone who buys a book wants free gift-wrapping; free parking at the mall does users of public transportation no good. But this does not justify judicial intervention in the market. Consumers, overall, prefer to have the option of using credit cards; merchants can operate more efficiently if they accept such cards (or else they would not do so). And Amex's

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[7] Consumer Fin. Prot. Bureau, *The Consumer Credit Card Market* 5 (Dec. 2017), http://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2017.pdf.

nondiscrimination provisions leave merchants free to offer discounts to consumers who pay with cash, checks, or debit cards. *See* 15 U.S.C. § 1693*o*-2(b)(2)(A); Pet. Br. 7. That merchants rarely offer such discounts is a matter of their choice.

More fundamentally, the supposed (though unproven) impact on consumers who do not use credit cards is irrelevant to antitrust law's basic concern, which is fulfilling consumer demand by protecting competition. The possibility that increased credit card use imposes an indirect burden on those who do not use credit cards raises questions of welfare redistribution in the bailiwick of a legislature or a regulator, not an antitrust court. *Cf.* 15 U.S.C. § 1693*o*-2(a) (granting the Federal Reserve authority over interchange rates for debit cards); *linkLine*, 555 U.S. at 452 ("Courts are ill suited 'to act as central planners, identifying the proper price, quantity, and other terms of dealing.'") (quoting *Trinko*, 540 U.S. at 408).

B. Theoretical Claims of "Harm to the Competitive Process" Cannot Substitute for Evidence of Actual Harm to Competition

Lacking direct or indirect proof that Amex's nondiscrimination provisions deprived the market of credit card services, Plaintiffs argue that they nevertheless sustained their burden by asserting that the challenged restraints "harmed the competitive process in the credit-card industry." U.S. Br. 49; *see* Pet. Br. 34. Such arguments seek to reverse the tide of this Court's precedents by subjecting Amex's *vertical* nondiscrimination provisions to the equivalent of a "quick look" standard that has been reserved exclusively for *horizontal* restraints. Furthermore, Plaintiffs propose no workable standard to identify

the sort of "harms to the competitive process" that should be subject to condemnation.

1. Plaintiffs' "competitive process" argument seeks to equate the competition-suppressing effects of horizontal agreements with the competition-intensifying effects of vertical agreements. In particular, they rely exclusively on cases in which this Court has applied "quick look" treatment to horizontal restraints that expressly restrict output. Pet. Br. 31-32; U.S. Br. 25-28, 47-49. For example, *Indiana Federation of Dentists* condemned "a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire." 476 U.S. at 459. And *NCAA* condemned a "horizontal agreement" imposing "an artificial limit on the quantity of televised football that is available to broadcasters and consumers." 468 U.S. at 99.

This Court has rightly confined "quick look" analysis to this narrow class of horizontal restraints that "an observer with even a rudimentary understanding of economics could conclude . . . would have an anticompetitive effect on customers and markets." *California Dental*, 526 U.S. at 770; *see Texaco Inc. v. Dagher*, 547 U.S. 1, 7 n.3 (2006) (explaining that "quick look" condemnation applies only to "business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability"). Indeed, the Court rejected such abbreviated review (in favor of full examination) in a case alleging that one horizontal competitor gave another a "payment in return for staying out of the market," recognizing that the challenged agreements involved settlements that generally are procompetitive. *Actavis*, 133 S. Ct. at 2234.

And this Court has never applied "quick look" treatment to condemn vertical restraints, which likewise generally have procompetitive virtues.

Plaintiffs claim that the nondiscrimination provisions are "different from the vertical restraints this Court has considered in other recent cases" because their "effect" is to "block *inter*brand" competition. U.S. Br. 23-24. But this Court has previously rejected claims that vertical restraints with supposed horizontal effects cross the vertical-horizontal line: "[A] restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement." *Business Elecs.*, 485 U.S. at 730 & n.4. Adopting Plaintiffs' position would "introduce[] needless confusion" into the antitrust laws by blurring the fundamental distinction between vertical and horizontal restraints. *Id.* at 730.

2. Furthermore, notwithstanding petitioners' promise "to provide greater clarity over the rule of reason," Pet. 16, Plaintiffs offer no administrable standard to assess when supposed interference with the "competitive process" should give rise to condemnation of a vertical restraint. All restraints, by definition, restrain competition in some fashion. *See Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918) ("Every agreement concerning trade, every regulation of trade, restrains."). To say that the competitive process is restrained is to pose the rule-of-reason question, not to answer it. For example, many other vertical restraints – exclusive dealing, output contracts, requirements contracts – affect horizontal competition by limiting a competitor's access to a valued resource or distribution channel. *See* Hovenkamp, *Rule of Reason* 58-60. Such agreements are ubiquitous and – in the absence of market power

– pre-sumptively benign even though they restrain the "competitive process." *See, e.g.*, XI *Antitrust Law* ¶ 1821c, at 196 (3d ed. 2011) (proposing a standard of *per se* legality for distribution restraints unless defendant has "a minimum ... market share in the range of 30 or 40 percent" and the challenged agreements "are 'robust' in the twin senses that they require absolute exclusion and cannot be evaded in a short period of time").

Plaintiffs' claim that Amex's nondiscrimination provisions "'disrupt the proper functioning of the price-setting mechanism of the market,'" Pet. Br. 34 (quoting *Indiana Fed'n of Dentists*, 476 U.S. at 461-62), likewise fails to differentiate between procompetitive and anticompetitive vertical restraints. As discussed above, restraints on the competitive process *at the distribution level* generally enhance interbrand competition, to the benefit of consumers. Thus, it is perfectly reasonable for a firm that lacks market power to demand dealer loyalty by contract. The "competitive process" that the government seeks to protect may give merchants leverage over the card networks, but that leverage harms networks' competition for consumers, which is antitrust law's proper concern.

Plaintiffs also posit that prohibiting merchant steering makes cardholder demand less responsive to net price. Pet. Br. 34. Even as a theoretical matter, the suggestion that greater merchant freedom will benefit consumers is doubtful. Like most distributor restraints, the procompetitive tendency of the nondiscrimination provisions is to prevent merchants from undermining the billions of dollars that networks and issuers invest in making their cards valuable to cardholders and merchants alike. More fundamentally, the plaintiff's burden of proof in a rule-of-reason case

is to offer not just hypotheses but evidence – here, proof that prohibiting merchant steering actually raises net two-sided prices to supracompetitive levels. And even then Plaintiffs would have to explain how such evidence could be squared with the undisputed evidence of increased market-wide output, which is a clear sign of vibrant competition. Plaintiffs cannot resort to economic generalities when the search for concrete evidence comes up empty, as it did here. Setting the rule-of-reason bar so low will encourage meritless lawsuits and unwarranted condemnation of procompetitive vertical restraints.

Amici economists argue that this Court should disregard increasing output in the credit card market because that increase is the result of a "distortion" that makes credit cards *too* attractive to consumers. Connor et al. Br. 35. The argument that market competition is providing excessive benefits, making other forms of payment less attractive, may interest a regulator, but it has nothing to do with the case Plaintiffs presented. (Indeed, it depends on the assertion that the relevant market is "all payment methods," *id.*, which Plaintiffs vigorously disputed below.) The claim that increased output in response to enhanced cardholder benefits suggests inefficiency is nonsense: any shift to credit cards reflects consumer-benefiting innovation (which is why merchants rarely provide discounts for consumers to use other forms of payment). Authorizing antitrust plaintiffs to challenge output-enhancing agreements on the ground that they "distort" the market would stray far from this Court's precedents and be at least as unadministrable as a rule allowing challenges to above-cost price-cutting. *Cf. Brooke Grp.*, 509 U.S. at 223 (noting that such a standard would "court[] intolerable risks").

One credit card company – Discover – supports Plaintiffs and complains that the restraint on merchant steering impedes its low-cost-to-merchants strategy. *See* Discover Br. 28-30. The trial evidence shows, however, that Discover's business model struggled because of low cardholder benefits, the ubiquity of Visa and MasterCard, and technical limitations. *See* Tr. 955:1-956:17, 957:12-17, 4182:13-4184:12, 4192:23-4193:1. Notably, there is no evidence that Discover attempted any such low-cost strategy in the millions of merchant locations, involving hundreds of billions of dollars of commerce, where Amex was not accepted and where anti-steering rules were not in place. More fundamentally, Discover has no right to pursue a form of competition that depends on conspiring with Amex's own distributors to discriminate against Amex's products. *See supra* pp. 26-27 (explaining the procompetitive benefits of restraints designed to ensure distributor loyalty). Discover remains no less able than other networks to compete for merchant acceptance, cardholders, and cardholder spending. If it has been unsuccessful, it can hardly lay that failure at Amex's feet.

3. It would be problematic enough to judicially restructure a market affecting "an astronomical number of retail transactions in the United States." Pet. 26. But the problems with Plaintiffs' position extend far beyond this case.

"Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason." Easterbrook, *Limits of Antitrust*, 63 Tex. L. Rev. at 12-13. Courts cannot realistically and reliably navigate claims about a restraint's effect on the "competitive process" without

using the fixed stars of market power, output, and supracompetitive prices. Yet Plaintiffs propose a standard lacking in nearly everything that has mattered in prior cases. Ruling for Plaintiffs here would:

- Obliterate the "appreciated differences ... between vertical and horizontal agreements," *Leegin*, 551 U.S. at 888;
- Eliminate market power as a way to distinguish procompetitive from anticompetitive restraints;
- Permit condemnation of vertical restraints even in the face of undisputed evidence of enormously increased output; and
- Relieve plaintiffs challenging a vertical restraint of the burden to adduce basic evidence of supracompetitive prices, costs, and profit margins.

In an area of law where this Court has required "clear rules," *linkLine*, 555 U.S. at 452, Plaintiffs would leave lower courts with no rules at all – just a blank slate for the finder of fact to decide what restraints "harm the competitive process." But, "[w]hen everything is relevant, nothing is dispositive," and antitrust law "offers no help to businesses planning their conduct." Easterbrook, *Limits of Antitrust*, 63 Tex. L. Rev. at 12. Moreover, the danger that antitrust law "could deter or penalize perfectly legitimate conduct," *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984), is always lurking, especially in challenges to vertical restraints. That is why "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita*, 475 U.S. at 588. Plaintiffs' "competitive process" standard admits of no such limits, and their resort to asking the Court to render their burden an effective nullity is a sure sign that they failed to sustain it.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

MICHAEL K. KELLOGG
AARON M. PANNER
DEREK T. HO
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

BENJAMIN J. HORWICH
JUSTIN P. RAPHAEL
MUNGER, TOLLES & OLSON LLP
560 Mission Street
San Francisco, CA 94105
(415) 512-4000

EVAN R. CHESLER
Counsel of Record
PETER T. BARBUR
KEVIN J. ORSINI
RORY A. LERARIS
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
(echesler@cravath.com)

LAUREEN E. SEEGER
MARK CALIFANO
SUZANNE E. WACHSSTOCK
AMERICAN EXPRESS COMPANY
200 Vesey Street
New York, NY 10080

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No. 16-1454

In the Supreme Court of the United States

STATE OF OHIO, ET AL., PETITIONERS

v.

AMERICAN EXPRESS COMPANY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONERS

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
MAKAN DELRAHIM
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
BRIAN H. FLETCHER
Assistant to the Solicitor General
WILLIAM J. RINNER
Counsel to the Assistant Attorney General
KRISTEN C. LIMARZI
ROBERT B. NICHOLSON
JAMES J. FREDRICKS
CRAIG W. CONRATH
JOHN R. READ
NICKOLAI G. LEVIN
ANDREW J. EWALT
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

In this antitrust enforcement action, the United States and a group of States challenged "anti-steering" rules that American Express imposes on the merchants that accept its credit cards. The rules prohibit merchants from encouraging their customers to use other credit cards that charge the merchants lower fees, or even truthfully disclosing to customers the relative cost of different cards. Applying the rule of reason, the district court held that the anti-steering rules violate Section 1 of the Sherman Act, 15 U.S.C. 1 *et seq.* The court found that the rules stifle price competition among credit-card networks, allowing all major networks to raise their merchant fees, blocking low-fee rivals, and inflating retail prices. The question presented is as follows:

Whether the district court's findings that the anti-steering rules stifle price competition, block low-fee rivals, raise merchant fees, and inflate retail prices were sufficient to establish a prima facie case that the rules unreasonably restrain trade.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-58a) is reported at 838 F.3d 179. The decision of the district court (Pet. App. 63a-259a) is reported at 88 F. Supp. 3d 143.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 2016. A petition for rehearing was denied on January 5, 2017 (Pet. App. 324a-326a). On March 24, 2017, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including May 5, 2017. On April 24, 2017, Justice Ginsburg further extended the time within which to file a petition to and including June 2, 2017, and the petition was filed on that date. The petition was granted on October 16, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. 1 *et seq.*, provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

STATEMENT

This case is an antitrust enforcement action brought by the United States and a group of States against American Express (Amex). The suit challenges "anti-steering" rules that Amex imposes on merchants that accept its credit cards. Those rules bar merchants from encouraging their customers to use other credit cards that charge the merchants lower fees—by, for example, offering a discount, stating a preference, or even truthfully disclosing the relative costs of different cards. The district court found that the anti-steering rules have stifled price competition among the major credit-card networks, blocked low-fee rivals, raised merchant fees, and inflated retail prices. The question presented is whether those undisturbed factual findings suffice to make out a prima facie case that the anti-steering rules unreasonably restrain trade.

A. Credit-Card Networks Compete For Both Cardholders And Merchants

1. Amex and other credit-card networks provide different bundles of services to "two distinct sets of consumers," cardholders and merchants. Pet. App. 69a. Cardholders receive the convenience of making purchases without cash and deferring payment until their monthly bills are due. *Id.* at 75a. They may also receive other benefits, such as access to a line of credit, fraud protection, and frequent-flier miles or other rewards

based on their spending. *Id.* at 74a-75a, 89a-90a. In exchange, cardholders may pay annual or other fees, as well as interest on any balance that is carried past their monthly billing cycle. *Ibid.*

Merchants that accept Amex cards receive a guarantee of payment from Amex, as well as related payment-processing services. Pet. App. 82a-84a. In exchange, merchants pay Amex a "merchant discount fee" based on a percentage of each transaction. *Id.* at 82a-83a. For example, a drugstore that accepts an Amex card for a $100 purchase might receive only $97 from Amex—the purchase price less a three percent fee.

Amex operates a vertically integrated system and usually provides services directly to both cardholders and merchants. Pet. App. 83a-84a. Visa and MasterCard, in contrast, deal with cardholders and merchants through third-party banks known as issuers and acquirers. *Id.* at 81a-83a. Issuers like Citibank, Chase, and Capital One issue cards and provide services to cardholders; acquirers serve merchants. *Id.* at 81a-84a. Visa and MasterCard facilitate the interaction between issuers and acquirers and set the rules for the system. *Ibid.* In that role, they "establish nearly all elements of the price charged to merchants" by Visa- and MasterCard-affiliated acquirers. *Id.* at 82a.[1]

The credit-card business involves a "two-sided" platform, in which the value of a network to customers on each side depends in part on the number of customers on the other. Pet. App. 77a (citation omitted). A card

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[1] Amex has begun to rely on third-party issuers and acquirers, but those entities still account for only a small fraction of its business. Pet. App. 84a-86a. The fourth major network, Discover, has a hybrid system. It issues cards directly to cardholders, but deals with merchants through acquirers. *Id.* at 86a.

"is more valuable to the cardholder when there are more merchants willing to accept that card." *Id.* at 79a. Conversely, "the value to merchants of accepting [a network's] cards increases with the number of cards on that network in circulation." *Ibid.* Other familiar businesses with the same feature include "[n]ewspapers and other advertising-based forms of media," which "sell distinct products and services to subscribers and advertisers," as well as "a seemingly endless array of Internet companies like eBay, OpenTable, eHarmony, and Groupon," all of which serve to "facilitate some form of value-generating interaction between distinct sets of consumers." *Id.* at 77a-78a.

2. Credit cards "have become a principal means by which consumers in the United States purchase goods and services." Pet. App. 73a-74a. In 2013, the four major networks charged merchants more than $50 billion in fees to process nearly $2.4 trillion in transactions. *Id.* at 74a. Amex was the second-largest network, capturing 26.4% of that volume. *Id.* at 151a. The rest was divided among Visa (45%), MasterCard (23.3%), and Discover (5.3%). *Ibid.*

Because of Amex's business model, including its direct merchant relationships and its "premium pricing," its cards are accepted by fewer merchants than are the cards of its competitors. Pet. App. 186a. Roughly 6.4 million merchant locations accept Amex cards, in comparison to more than 9 million locations for Visa, MasterCard, and Discover. *Id.* at 184a-185a. But Amex cards are accepted by virtually all of the Nation's largest merchants, and the merchants that accept Amex cards account for more than 90% of credit-card transactions by dollar volume. *Id.* at 188a, 224a & n.48; C.A. App. 1457-1458, 1475, 1728.

B. Amex Strengthens Its Anti-Steering Rules In Response To Price Competition From Visa And MasterCard

Amex has long charged merchants higher fees than its competitors. Pet. App. 174a-177a. In the 1990s, Visa launched a marketing campaign that highlighted Amex's "significantly higher" fees and urged merchants to save money by encouraging their customers to pay with Visa cards instead. *Id.* at 91a-92a. Visa suggested that merchants could use "'inoffensive, yet effective'" methods to steer their customers to use lower-fee Visa cards—by, for example, displaying "We Prefer Visa" signs. *Id.* at 199a (citation omitted); see *id.* at 92a. Visa also distributed a "profit improvement calculator" that allowed merchants to determine exactly how much they would save by shifting transactions from Amex to Visa. J.A. 101-104, 207-210. MasterCard engaged in a similar campaign. Pet. App. 92a. Those efforts "were remarkably effective" and caused a substantial shift in transaction volume from Amex to Visa and MasterCard. *Ibid.*

Amex considered responding to this price competition by "reducing [its] discount rate" or "better communicat[ing] to merchants the value they received for the premium price charged." Pet. App. 200a. But rather than relying on those strategies, Amex chose to "stifle any further steering or preference campaigns" by strengthening the anti-steering rules in its merchant contracts. *Ibid.*; see *id.* at 93a. As modified, Amex's anti-steering rules prohibit merchants from offering customers discounts or other incentives to use other cards, expressing a preference for another card, or even truthfully disclosing the relative costs of different cards. *Id.* at 95a-96a.

Under the anti-steering rules, a merchant may not, for example:

- Offer "free shipping," "free checked bags," or "any other monetary incentive for using [a] Discover card."
- Offer a "designated checkout lane," "priority boarding," or "any other non-monetary incentive [for] using a MasterCard."
- Post a sign disclosing "the merchant's actual cost of accepting each network's cards."
- Inform customers that its "retail prices might be lower if it were better able to control its credit card costs."
- Respond to "a customer's inquiry into its credit card costs."

Pet. App. 100a-101a. The anti-steering rules prohibit merchants from taking any of these actions "even when American Express is not mentioned," and even when the affected customer does not have an Amex card. *Id.* at 101a-102a.[2]

The "vast majority" of merchants are bound by Amex's "standard card acceptance agreement," including its standard anti-steering rules. Pet. App. 94a-95a. Some large merchants—fewer than 1000—have negoti-

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[2] The United States and the States have not challenged provisions of the anti-steering rules that prohibit merchants from imposing special fees on customers paying with Amex cards, mischaracterizing Amex, or otherwise harming Amex's brand. Pet. App. 96a-97a.

ated contracts that depart from the standard agreement. *Id.* at 95a. Even within that group, the anti-steering rules "are only rarely subject to negotiation." *Id.* at 97a. Although "many" large merchants have asked Amex to remove the rules from their contracts, Amex has granted only a few, limited exceptions, such as temporary promotions and "co-brand[ed]" cards like the Southwest Airlines Visa card. *Id.* at 97a-98a. Amex "actively monitors" compliance with the anti-steering rules and "vigorously enforces" the rules to prevent merchants from encouraging their consumers to use less-expensive cards. *Id.* at 102a-103a; see *id.* at 104a & n.6.

C. The District Court Holds That Amex's Anti-Steering Rules Unreasonably Restrain Trade

In 2010, the United States and a group of States sued Amex, as well as Visa and MasterCard, which had adopted their own anti-steering rules. The suit alleged that the anti-steering rules unreasonably restrained trade, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1 *et seq.* Pet. App. 21a-22a. Visa and MasterCard entered into consent judgments and rescinded their anti-steering rules. *Id.* at 22a. Amex proceeded to trial.

The district court held a seven-week bench trial, which included testimony from four experts, "nearly twenty merchant witnesses representing a selection of the nation's largest retailers, airlines, and hotels," and executives from Amex, Visa, MasterCard, and Discover. Pet. App. 72a. The trial record included nearly 7000 transcript pages and more than 1000 exhibits. *Ibid.* Based on that record, the court held that the anti-steering rules violate Section 1 because they have "short-circuit[ed] the ordinary price-setting mechanism" in the

credit-card industry, causing "an absence of price competition" and "dramatically" higher merchant fees. *Id.* at 71a; see *id.* at 63a-259a.

1. The district court analyzed the anti-steering rules under the rule of reason, "the most searching form of antitrust analysis." Pet. App. 107a. The rule of reason requires the factfinder to "weigh all of the circumstances of a case" in order to determine "whether the challenged agreement is one that promotes competition or one that suppresses competition." *Id.* at 107a-108a (brackets and citation omitted). Courts applying the rule of reason follow "a three-step burden shifting framework." *Id.* at 108a. The plaintiff bears the initial burden to show that the challenged restraint is "*prima facie* anticompetitive." *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 771 (1999). If the plaintiff makes that showing, the burden shifts to the defendant to establish a "procompetitive justification." *Ibid.*; see Pet. App. 110a. If the defendant does so, the burden shifts back to the plaintiff to show that the "'legitimate competitive benefits' proffered by [the defendant] could have been achieved through less restrictive means." Pet. App. 110a (citation omitted).

2. The district court began its rule-of-reason analysis by defining the relevant market. Pet. App. 111a-148a. An antitrust market consists of products "that have reasonable interchangeability for the purposes for which they are produced," such that customers would switch from one product to another if faced with a price increase. *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956). Here, the court concluded that the market restrained by the anti-steering rules is the market for "general purpose credit and charge card

network services" of the type that Amex provides to merchants. Pet. App. 112a-113a.

The district court rejected Amex's contention that the market must be defined to include services to cardholders as well as merchants. Pet. App. 114a-122a. The court recognized that the credit-card industry is "two-sided," and that networks compete for both merchants and cardholders. *Id.* at 121a-122a; see *id.* at 77a-78a. The court explained, however, that the two markets are "distinct" because they involve "different sets of rivals and the sale of separate, though interrelated, products and services to separate groups of customers." *Id.* at 119a.

Although the district court rejected Amex's proposed market definition, it noted that the "two-sided" nature of a credit-card platform is relevant to the Section 1 analysis because "the antitrust significance of a restraint that nominally affects conduct on only one side of [a credit-card] platform cannot be assessed without considering its impact on the other side of the platform." Pet. App. 121a-122a. The court thus recognized that standard antitrust principles "must be applied in a manner that carefully accounts for the competitive realities in multi-sided platforms." *Id.* at 122a.

3. The plaintiff in a rule-of-reason case may establish a prima facie case either indirectly or directly. Pet. App. 108a-109a. Under the indirect method, the court infers the existence of anticompetitive effects from proof that the defendant has "sufficient market power to cause an adverse effect on competition" and the existence of "grounds to believe that the defendant's behavior will harm competition market-wide." *Id.* at 109a (citations omitted). The direct method requires proof of an actual "adverse effect on competition." *Id.* at 108a (citation omitted). The district court held that the

United States and the States had established a prima facie case under both methods. *Id.* at 148a-228a.

a. The district court first held that Amex has market power. Pet. App. 148a-191a. The court explained that Amex captures 26.4% of a concentrated market with significant barriers to entry. *Id.* at 150a-156a. The court noted that Amex's market power is magnified by "cardholder insistence," the term Amex uses to describe the fact that many merchants cannot realistically refuse to accept Amex cards because too many of their customers would shop elsewhere if they did. *Id.* at 156a-165a. The court also relied on Amex's demonstrated ability to significantly increase its fees without causing merchants to stop accepting its cards. *Id.* at 165a-180a. The court further found that the anti-steering rules were likely to harm competition market-wide. *Id.* at 193a-194a.

b. The district court separately held that the anti-steering rules have caused "actual, sustained adverse effects on competition." Pet. App. 193a (citation omitted); see *id.* at 191a-228a. The court found that "[p]rice competition is a critical avenue of horizontal interbrand competition, and yet it is frustrated to the point of near irrelevance" by the anti-steering rules. *Id.* at 195a. The court explained that, once a merchant identifies the set of networks from which it will accept cards, the cardholder decides which of those cards to use for a particular transaction. *Id.* at 196a. By barring merchants from encouraging cardholders to use lower-fee cards, the rules impede merchants' ability to control their consumption of a network's services in response to changes in the network's price. *Ibid.* As a result, "there is virtually no check on the networks' incentive or ability to

charge higher prices to merchants, so long as the network's pricing is below the level at which a rational merchant would drop acceptance entirely." *Id.* at 197a.

The district court also found that the anti-steering rules "render it nearly impossible" for a new network to enter the market "by offering merchants a low-cost alternative to the existing networks." Pet. App. 203a. The court observed that Discover had tried to pursue that strategy in the 1990s and had been thwarted by the anti-steering rules, which "denied merchants the ability to * * * steer share to Discover's lower-priced network." *Id.* at 205a. Discover therefore had "abandoned its low-price business model" and had "radically increase[d]" its merchant fees to align with those charged by Visa and MasterCard. *Id.* at 206a, 210a.

The district court further found that, by stifling price competition, the anti-steering rules "allowed all four networks to raise their [merchant] fees more easily and more profitably." Pet. App. 207a. For example, the rules were "integral" to Amex's ability to increase its fees repeatedly between 2005 and 2010 in order to restore its premium over its rivals' elevated rates. *Id.* at 208a-209a. Starting from fees "already at or above the competitive level," Amex had imposed at least twenty "Value Recapture" price increases on more than a million merchants, "without any meaningful merchant attrition." *Id.* at 150a, 167a.

The district court found that the higher merchant fees made possible by the anti-steering rules had "resulted in increased prices for consumers" because merchants "pass most, if not all, of their additional costs along to their consumers in the form of higher retail prices." Pet. App. 210a-211a. Those higher prices "af-

fect not only those customers who use American Express cards, but also shoppers who instead prefer to pay using a lower-rewards [credit] card, debit card, check, or cash." *Id.* at 211a.

4. Having concluded that the United States and the States had established a prima facie case under both the indirect and direct methods, the district court shifted the burden to Amex to show that its anti-steering rules had redeeming procompetitive effects. Pet. App. 228a. The court held that Amex had failed to make that showing. *Id.* at 228a-258a. *Inter alia*, the court rejected Amex's contention that the rules are justified because they protect its "differentiated business model," which relies on charging higher merchant fees to offer more generous cardholder rewards. *Id.* at 229a; see *id.* at 229a-236a. The court held that, to find the anti-steering rules reasonable "because they shield [Amex's] preferred business strategy from a legitimate form of interbrand competition, especially competition on the basis of price, would amount to 'nothing less than a frontal assault on the basic policy of the Sherman Act.'" *Id.* at 235a (quoting *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 695 (1978)).

D. The Court Of Appeals Reverses

The court of appeals reversed and directed entry of judgment for Amex. Pet. App. 1a-58a. The court did not overturn any of the district court's factual findings as clearly erroneous. Instead, it held that those findings were legally insufficient to establish a prima facie case that the anti-steering rules unreasonably restrain trade.

1. The court of appeals first held that the district court had "erred in excluding the market for cardholders from its relevant market definition." Pet. App. 32a;

see *id.* at 31a-40a. The court emphasized the "interdependence" of credit-card networks' competition for merchants and their competition for cardholders, and it stated that separating those two avenues of competition into different antitrust markets could allow "legitimate competitive activities in the market for [cardholders] to be penalized no matter how output-expanding such activities would be." *Id.* at 35a.

2. The court of appeals next held that the district court had erred in holding that Amex has market power. Pet. App. 40a-48a. It concluded that the district court should not have focused on increases in Amex's merchant fees because Amex uses a portion of those fees to provide cardholder rewards (which are functionally equivalent to reduced prices for cardholders). *Id.* at 43a-44a. The court stated that the district court should have calculated Amex's "two-sided price"—that is, the aggregate amount charged to both merchants and cardholders. *Id.* at 44a (citation omitted). The court also held that the district court had erred in relying on "cardholder insistence" as evidence of market power. *Id.* at 45a-48a. The court reasoned that, "so long as Amex's market share is derived from cardholder satisfaction, there is no reason to intervene." *Id.* at 48a.

3. Finally, the court of appeals overturned the district court's holding that the United States and the States had made a prima facie case that the anti-steering rules have an actual adverse effect on competition. Pet. App. 49a-53a. The court did not question the district court's findings that the anti-steering rules stifle price competition and thereby cause merchants (and their customers) to pay more. The court held, however, that those findings were insufficient to establish a prima fa-

cie case because the district court had "failed to consider the two-sided net price accounting for the effects of the [anti-steering rules] on both merchants and cardholders." *Id.* at 49a. To prove anticompetitive effects using higher prices, the court stated, the United States and the States were required to provide at minimum a "reliable measure of American Express's two-sided price that appropriately account[ed] for the value or cost of the rewards paid to cardholders." *Id.* at 53a (citation omitted). The court also stated that the United States and the States bore the "initial burden" to show that the anti-steering rules "made *all* Amex consumers on both sides of the platform—*i.e.*, both merchants and cardholders—worse off overall." *Id.* at 51a.

SUMMARY OF ARGUMENT

The district court found that Amex's anti-steering rules have stifled price competition among credit-card networks, blocked low-fee rivals, raised fees for millions of merchants, and inflated the retail prices paid by hundreds of millions of consumers. Those undisturbed findings established a prima facie case that the anti-steering rules unreasonably restrain trade.

A. The plaintiff in a rule-of-reason case bears the initial burden to show that the challenged restraint is "*prima facie* anticompetitive." *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 771 (1999). If it does so, "the burden of procompetitive justification" shifts to the defendant. *Ibid.* A plaintiff may establish a prima facie case with direct evidence that the restraint has "actual detrimental effects" on competition. *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 460 (1986) (*Indiana Dentists*).

B. The United States and the States carried their initial burden by introducing overwhelming proof that the anti-steering rules impose "actual, sustained adverse

effects on competition." *Indiana Dentists*, 476 U.S. at 461. As the district court found, steering is an essential prerequisite for meaningful competition on merchant fees because it is the way merchants control their consumption of—and expenditures on—a network's services. The purpose and effect of the anti-steering rules is to prevent merchants from altering their consumption of Amex's services in response to changes in price by Amex *or by other networks*—and thus to suppress interbrand price competition between Amex and its rivals. Indeed, the district court found that the anti-steering rules "create a competitive environment in which there is virtually no check on the networks' incentive or ability to charge higher prices to merchants, so long as the network's pricing is below the level at which a rational merchant would drop acceptance entirely." Pet. App. 197a.

The district court thus found that the rules have "allowed all four networks to raise their swipe fees more easily and more profitably," Pet. App. 207a, leading to higher merchant fees—and, ultimately, to higher retail prices for all consumers. The court also found that the anti-steering rules make it "nearly impossible" for a new firm to enter the concentrated network-services market by offering merchants a low-cost alternative—a point that was vividly illustrated by the failure of Discover's low-cost strategy in the late 1990s. *Id.* at 203a.

C. The court of appeals did not purport to overturn any of those factual findings as clearly erroneous. Nonetheless, it held that the district court had fatally erred by defining the relevant market to include only services to merchants, not services to cardholders. That is incorrect for two reasons.

First, this Court has repeatedly instructed that an antitrust market should be defined to include only products that are reasonable substitutes for each other. The court of appeals acknowledged that standard, but it never explained how the services that Amex provides to merchants are reasonably interchangeable with the services it provides to cardholders. In fact, they are not. Those two sets of services are undoubtedly related, and both are used when an Amex cardholder makes a purchase from an Amex-accepting merchant. But the two bundles of services are not substitutes in any sense.

Second, and in any event, the district court's findings that the anti-steering rules stifle price competition, inflate merchant fees, and block low-fee rivals were sufficient to establish a prima facie case even under the court of appeals' definition of the market. Indeed, when a court finds that a restraint has had "actual, sustained adverse effects on competition," "specific findings * * * concerning the definition of the market" are unnecessary. *Indiana Dentists*, 476 U.S. at 460-461. This Court thus need not resolve the market-definition question in order to hold that the United States and the States carried their initial burden.

D. The court of appeals deemed the district court's findings legally insufficient to establish even a prima facie case because—in the court of appeals' view—the district court did not adequately account for the anti-steering rules' purported benefits to Amex cardholders. At times, the court appeared to fault the United States and the States for failing to identify and negate *all* possible benefits of the anti-steering rules at the first step of the burden-shifting framework. To treat such a showing as an essential element of a Section 1 plaintiff's prima facie case would seriously distort the applicable burden-

shifting framework. It is the defendant's burden to establish a challenged restraint's procompetitive benefits, not the plaintiff's initial burden to anticipate and refute them.

At other times, the court of appeals appeared to hold that the United States and the States were required to provide a precise calculation of Amex's "two-sided" price, taking into account both its merchant fees and its cardholder rewards. That is incorrect for at least three reasons. First, restraints that prevent market forces from determining pricing in a two-sided business reflect a serious distortion of the competitive process even if the *sum* of the prices on both sides of the business does not increase. Second, and in any event, the district court found that the anti-steering rules *did* allow Amex to increase its two-sided, net price. Under the circumstances, a precise calculation of that price—something that Amex itself was not able to provide—was not necessary. Third, the court of appeals erred in focusing exclusively on *Amex's* pricing. The district court found that the anti-steering rules have allowed *all* networks to charge higher merchant fees and blocked low-fee rivals. Restraints that enable such unfettered price increases would properly be deemed prima facie anticompetitive even if (counterfactually) they had not increased *Amex's* two-sided price.

E. The court of appeals' approach to this case appears to have been driven in part by its recognition that antitrust analysis of the anti-steering rules should take account of the "two-sided" nature of Amex's platform. The court's concern about the interdependence of the two sides of Amex's platform was appropriate. But the court erred in requiring the United States and the States to negate Amex's claim that the anti-steering

rules have procompetitive benefits in the market for cardholders at the first (*i.e.*, prima facie case) step of the rule-of-reason analysis. Instead, Amex's asserted procompetitive justifications are properly considered (as the district court considered them) at the second step of the burden-shifting inquiry. This Court should thus vacate the judgment below, which held that the United States and the States failed to establish a prima facie case. On remand, the court of appeals can consider any challenges that Amex has properly preserved to the district court's holding that Amex had failed to establish sufficient procompetitive justifications for the anti-steering rules.

ARGUMENT

THE FACTS FOUND BY THE DISTRICT COURT ESTABLISH A PRIMA FACIE CASE THAT THE ANTI-STEERING RULES UNREASONABLY RESTRAIN TRADE

The district court found that Amex's anti-steering rules have stifled price competition among the major credit-card networks, blocked low-fee rivals, raised fees for millions of merchants, and inflated the retail prices paid by hundreds of millions of consumers. Those findings were based on an unusually robust evidentiary record, and the court of appeals did not purport to overturn any of them as clearly erroneous. The question presented in this Court is whether the district court's undisturbed factual findings established a prima facie case that the anti-steering rules unreasonably restrain trade.

The answer to that question is yes. This Court has instructed time and again that the central concern of the antitrust laws is the preservation of interbrand price competition. Restraints that stifle that competition and disrupt the free market's price-setting mechanism are

properly deemed (at least) prima facie anticompetitive—especially where, as here, they have demonstrably inflated prices and blocked low-priced rivals.

The court of appeals believed that Amex's use of a portion of its inflated fees to fund rewards for its cardholders justifies its suppression of interbrand competition on merchant fees. That is not so. Amex is free to pursue a strategy that relies on charging high merchant fees to fund especially generous cardholder rewards. Under the Sherman Act, however, Amex is not entitled to protect its preferred business model through restraints that effectively force the *entire industry* to forgo competition on merchant fees in favor of competition on cardholder rewards.

In any event, the court of appeals erred by requiring the United States and the States to prove, as an element of their prima facie case, that the harms to competition in the network-services market caused by Amex's anti-steering rules outweigh any benefits to cardholders that those rules may produce. The court was correct to recognize that the two-sided nature of the credit-card business affects the appropriate rule-of-reason analysis, and that benefits to cardholders should be considered in determining whether the anti-steering rules are lawful. In light of the abundant evidence that the rules harmed competition in the network-services market, however, the court of appeals should have affirmed the district court's holding that the United States and the States had established a prima facie case. This Court should vacate the Second Circuit's contrary holding, and should remand the case to allow the court of appeals to consider, at the second step of the three-step framework, any challenges that Amex has properly preserved to the district court's holding that it failed to establish

sufficient procompetitive justifications for the anti-steering rules.

A. A Plaintiff May Carry Its Initial Burden In A Rule-Of-Reason Case With Direct Evidence That A Restraint Has An Actual Adverse Effect On Competition

1. "Federal antitrust law is a central safeguard for the Nation's free market structures." *North Carolina State Bd. of Dental Exam'rs* v. *FTC*, 135 S. Ct. 1101, 1109 (2015). "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 4 (1958). "It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress." *Ibid.*

Section 1 of the Sherman Act implements that fundamental policy by prohibiting unreasonable restraints of trade. *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 885 (2007) (*Leegin*). Some restraints, such as "horizontal agreements among competitors to fix prices," are deemed *per se* unreasonable because of their "'manifestly anticompetitive'" character. *Id.* at 886 (citation omitted). Most restraints are analyzed under "[t]he rule of reason," which is "the accepted standard for testing whether a practice restrains trade in violation of [Section] 1." *Id.* at 885.

The "classic formulation" of the rule of reason, *American Needle, Inc.* v. *NFL*, 560 U.S. 183, 203 n.10 (2010), was articulated by Justice Brandeis nearly a century ago: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is

such as may suppress or even destroy competition." *Board of Trade of Chicago* v. *United States*, 246 U.S. 231, 238 (1918). The trier of fact ordinarily must consider all relevant circumstances, including "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; [and] the nature of the restraint and its effect." *Ibid.*; see *Leegin*, 551 U.S. at 885-886. In analyzing those circumstances, however, the "inquiry is confined to a consideration of [the restraint's] impact on competitive conditions." *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 690 (1978). "[T]he criterion to be used in judging the validity of a restraint on trade is its impact *on competition*." *NCAA* v. *Board of Regents*, 468 U.S. 85, 104 (1984) (emphasis added).

2. The plaintiff in a rule-of-reason case bears the initial burden to show that the challenged restraint is "*prima facie* anticompetitive." *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 771 (1999); see 7 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1502, at 398-399 (4th ed. 2017) (Areeda & Hovenkamp). A plaintiff can make that showing indirectly, by establishing that the defendant has "[m]arket power"—that is, "the power 'to force a purchaser to do something that he would not do in a competitive market.'" *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 464 (1992) (*Kodak*) (citation omitted). Market power is typically inferred from the defendant's market share and other relevant market conditions. *Ibid.*

Alternatively, a plaintiff may discharge its initial burden with *direct* evidence of the challenged restraint's anticompetitive effects. "[T]he purpose of the inquir[y] into * * * market power is to determine

whether an arrangement has the potential for genuine adverse effects on competition." *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 460 (1986). Accordingly, "'proof of *actual* detrimental effects' * * * can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *Id.* at 460-461 (citation omitted).[3]

A prima facie showing that the challenged restraint adversely affects competition "place[s] the burden of procompetitive justification on [the defendant]." *California Dental*, 526 U.S. at 771; accord *FTC* v. *Actavis, Inc.*, 133 S. Ct. 2223, 2236 (2013). That allocation follows the familiar rule that, "'where the facts with regard to an issue lie peculiarly in the knowledge of a party,' that party is best situated to bear the burden of proof." *Smith* v. *United States*, 568 U.S. 106, 112 (2013) (citation omitted). "The defendant, being the author of the restraints, is in a better position to explain why they are profitable and in consumers' best interests." Areeda & Hovenkamp ¶ 1505, at 171 (Supp. 2017).

If the defendant carries its burden, the plaintiff may prevail if it establishes that the restraint's objective "can be achieved by a substantially less restrictive alternative." 7 Areeda & Hovenkamp ¶ 1502, at 398-399. If the plaintiff fails to make that showing, the court must determine whether "the challenged behavior is, on balance, unreasonable." *Id.* at 399.

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[3] Indeed, proof "that a defendant's conduct exerted an actual adverse effect on competition * * * arguably is more direct evidence of market power than calculations of elusive market share figures." *Todd* v. *Exxon Corp.*, 275 F.3d 191, 206 (2d Cir. 2001) (Sotomayor, J.); see, *e.g.*, *Kodak*, 504 U.S. at 477; *Toys "R" Us, Inc.* v. *FTC*, 221 F.3d 928, 937 (7th Cir. 2000).

B. The Facts Found By The District Court Establish That The Anti-Steering Rules Have Severely Impaired Competition Among Credit-Card Networks

By introducing overwhelming proof that Amex's anti-steering rules impose "actual, sustained adverse effects on competition," *Indiana Dentists*, 476 U.S. at 461, the United States and the States carried their initial burden to establish a prima facie case that the rules unreasonably restrain trade. Indeed, few rule-of-reason cases have involved such extensive direct evidence of anticompetitive effects. That evidence was contained in a voluminous documentary record and thousands of pages of testimony from economists and market participants, including some of the Nation's leading merchants. Pet. App. 72a. And it was confirmed by the district court's findings that the anti-steering rules have stifled price competition in the network-services market, induced all networks to raise their merchant fees, blocked low-fee rivals, and inflated retail prices.[4]

1. The anti-steering rules stifle price competition

The anti-steering rules are subject to the rule of reason, rather than to the *per se* rule, because they are "vertical restraints between firms at different levels of production—namely, between [Amex] and its merchant-consumers." Pet. App. 105a. But the rules are significantly different from the vertical restraints this Court has considered in other recent cases. The anti-steering

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[4] The United States and the States made prima facie showings that Amex's anti-steering rules harm competition using both the indirect and direct methods. Pet. App. 148a-221a. We address only the direct proof of anticompetitive effects because the States did not seek further review of the court of appeals' holding that the United States and the States had failed to establish a prima facie case under the indirect method. Pet. i, 18-25.

rules do not limit *intra*brand competition among retailers selling a manufacturer's products in order to enhance *inter*brand competition between the manufacturer and its rivals. Instead, the natural and demonstrated effect of the rules is to block *inter*brand merchant-fee (*i.e.*, price) competition among Amex and its rival networks. Indeed, the district court found that the rules have "frustrated" that "critical avenue of horizontal interbrand competition * * * to the point of near irrelevance." *Id.* at 195a.[5]

a. In recent decades, this Court has held that a variety of "vertical restraints a manufacturer imposes on its distributors," including restraints on the prices that distributors may charge, should be evaluated under the rule of reason rather than declared *per se* unlawful. *Leegin*, 551 U.S. at 882 (minimum prices); see, *e.g.*, *State Oil Co.* v. *Khan*, 522 U.S. 3, 7-8 (1997) (maximum prices); *Continental T. V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 58-59 (1977) (*Sylvania*) (exclusive territories). Each time, the Court has emphasized that the type of vertical restraint at issue was potentially procompetitive because it could "stimulate *inter*brand competition—the competition among manufacturers

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[5] During much of the period that Amex's anti-steering rules were in place, Visa and MasterCard had anti-steering rules as well. As a result of this suit, Visa and MasterCard have now rescinded their rules. Pet. App. 21a-22a. But the district court found that, because Amex's anti-steering rules prohibit *all* steering by Amex-accepting merchants, which account for more than 90% of credit-card transactions by dollar volume, the effect of Amex's rules by themselves is essentially the same as the previous combined effect of the three networks' rules. *Id.* at 180a, 206a-207a n.43. Thus, "Amex has been able to perpetuate" the "absence of inter-network competition on the basis of price * * * even after Visa and MasterCard abandoned their anti-steering rules." *Id.* at 180a.

selling different brands of the same type of product—by reducing *intra*brand competition—the competition among retailers selling the same brand." *Leegin*, 551 U.S. at 890 (emphasis added); see, *e.g.*, *State Oil*, 522 U.S. at 14-15; *Sylvania*, 433 U.S. at 51-55.

For example, a manufacturer may set minimum retail prices for its products in order to "encourage[] retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers." *Leegin*, 551 U.S. at 890. Without manufacturer-set minimum prices, a retailer might be reluctant to make those investments for fear of being undersold by rivals who free-ride on its efforts by selling the same manufacturer's goods at lower prices. *Ibid.* A manufacturer's use of vertical restraints to limit competition among its own retailers thus has "the potential to give consumers more options," allowing them to "choose among low-price, low-service brands; high-price, high-service brands, and brands that fall in between." *Ibid.* Restraints that limit intrabrand competition to promote interbrand competition are generally lawful because "the primary purpose of the antitrust laws is to protect interbrand competition." *State Oil*, 522 U.S. at 15; accord *Leegin*, 551 U.S. at 890.

b. Unlike the types of vertical restraints this Court addressed in *Leegin*, *State Oil*, and *Sylvania*, the anti-steering rules "do not purport to restrain intrabrand competition in favor of greater interbrand competition." Pet. App. 107a. That is, they do not limit competition among distributors of Amex's services to enhance competition among Amex and its rival networks. The merchants restrained by the anti-steering rules are Amex's

consumers, not its distributors (at least in any traditional sense). *Id.* at 74a n.4. The purpose and effect of the rules is to prevent those consumers from altering their consumption of Amex's services in responses to changes in price by Amex *or by other networks*—and thus to suppress *inter*brand price competition among and its rivals.

The ability of merchants to engage in steering is an essential prerequisite for meaningful competition on merchant fees because it is the way that merchants control their consumption of—and expenditures on—a network's services. In other contexts, "merchants routinely seek lower prices for necessary goods and services by promoting competition among multiple suppliers, often by rewarding competitive bidders with increased purchase volume." Pet. App. 216a. Merchants cannot *directly* control their consumption of a particular credit-card network's services in response to changes in the network's price, because the cardholder chooses (from among the cards that a particular merchant has chosen to accept) the card to be used for any given transaction. But just as merchants often "attempt to influence customers' purchasing decisions" through product placement, discounts, or other inducements, merchants could attempt to reduce their credit-card costs by encouraging their customers to use cards that charge the merchants lower fees. *Id.* at 67a.

Merchants have strong economic incentives to take that step because credit-card fees are a significant cost. Pet. App. 216a, 221a-222a. In 2013, for example, Hilton paid "[b]etween a half a billion and a billion dollars" in fees. Tr. 1608. Home Depot paid "roughly half a billion dollars." Tr. 1222. Alaska Airlines' credit-card costs are roughly double the cost of wages for its U.S. airport

employees. Tr. 192. And the credit-card costs for the Solitude ski resort exceed its costs for fuel to groom its slopes and power to run its lifts. Tr. 2523.

The district court's findings confirm that, if allowed to do so, merchants would seek to minimize those substantial costs by steering their customers towards less-expensive cards. In the 1990s, merchants participating in the "We Prefer Visa" campaign were "markedly successful at shifting spend to Visa's [lower-cost] network." Pet. App. 200a. And numerous merchants—including Enterprise, Sears, Home Depot, IKEA, Crate & Barrel, and Hilton—"testified that they would, in fact, steer if given the opportunity." *Id.* at 222a; see *id.* at 208a, 219a; see also Tr. 408-409, 2328-2329 (describing specific steering proposals).

Amex does not deny that it imposed its current anti-steering rules to "stifle any further steering or preference campaigns" after the success of the "We Prefer Visa" initiative. Pet. App. 200a. To be sure, Amex's anti-steering rules do not *preclude* other networks from charging merchant fees that are substantially lower than Amex's own. But by preventing merchants from shifting transactions to lower-cost (or otherwise preferred) networks, the rules largely eliminate any economic incentive for other networks to take that step. And the evidence before the district court amply demonstrated that the rules have stifled price competition among the networks and increased the merchant fees charged by all four of them.

As the district court found, "[s]teering is a lynchpin to inter-network competition on the basis of price," because a credit-card network "cannot increase sales or gain market share by offering merchants a more attractive price

than its competitors" unless merchants are capable of responding by "shift[ing] share in response to pricing differentials." Pet. App. 196a. The anti-steering rules therefore "create a competitive environment in which there is virtually no check on the networks' incentive or ability to charge higher prices to merchants, so long as the network's pricing is below the level at which a rational merchant would drop acceptance entirely." *Id.* at 197a.

c. The anti-steering rules' suppression of price competition would be mitigated if merchants could feasibly escape Amex's prohibition on steering by "refus[ing] to accept Amex cards altogether." Pet. App. 196a. But often that is not a realistic option, especially for large merchants. Many Amex cardholders are, to use Amex's term, "insistent" on using their Amex cards, and will shop elsewhere if a merchant stops accepting Amex. *Id.* at 156a-157a. Some Amex cardholders—10% to 20%—hold or regularly carry *only* Amex cards. *Id.* at 157a-158a. Others prefer to "consolidate their credit card spending on their American Express cards" to take advantage of Amex's rewards. *Id.* at 158a. And still others are required by their employers "to use Amex cards for business expenses." *Ibid.*

The district court found that this cardholder insistence "effectively prevents merchants from dropping American Express." Pet. App. 158a; see *id.* at 129a. Enterprise, for example, "determined it could not drop Amex because its 'corporate customers were not interested in paying for their rental [cars] with a different method of payment.'" *Id.* at 159a n.27 (quoting Tr. 492) (brackets omitted). IKEA, Best Buy, and Sprint likewise "analyzed the issue in detail" and concluded that they could not stop accepting Amex. *Id.* at 158a-159a; see *id.* at 159a n.27. Other merchants, including Alaska Airlines, Sears, Crate & Barrel,

and Hilton, have never seriously considered dropping Amex because it would obviously be unprofitable to do so. *Id.* at 158a & n.26. And at least two large merchants that tried to stop accepting Amex cards were "forced to retreat" in the face of resistance from their customers. *Id.* at 163a; see *id.* at 162a-163a (describing attempts by Walgreens and Murphy Oil).[6]

d. Because the anti-steering rules apply "even when American Express is not mentioned" or the customer being steered does not have an Amex card, the effect of the rules is "inflicted across the [credit-card] industry." Pet. App. 101a-102a. The 6.4 million merchant locations that accept Amex cards cannot engage in steering efforts with respect to *any* brand of credit cards. Those locations account for more than 90% of all credit-card spending. See p. 4, *supra*.

The participants in the market "recognize the dysfunction" caused by the anti-steering rules. Pet. App. 198a. As a Southwest Airlines executive put it, "the market is broken" because the rules allow the networks to avoid competing on price. *Ibid.* (quoting Tr. 2440). Amex, too, "recognizes the absence of competition on the basis of merchant pricing." *Id.* at 197a. In developing its pricing strategy, Amex "does not account for any downward pressure associated with its competitors'

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[6] The court of appeals held that this "cardholder insistence" could not establish Amex's market power under the indirect method of proving harm to competition. Pet. App. 45a-49a. Whatever the merits of that legal holding, the court did not question the district court's factual finding that merchants' theoretical ability to stop accepting Amex cards has not practically constrained Amex's ability to raise merchant fees. That undisturbed factual finding confirms, under the direct method, the actual anticompetitive effects of the anti-steering rules.

swipe fees." *Ibid.* And an Amex executive acknowledged at trial that, when it comes to merchant fees, it is not "anybody's business strategy" to be "cheaper than the next guy." *Ibid.* (quoting Tr. 2667-2668).

2. The anti-steering rules raise merchant fees and inflate retail prices

The district court's findings confirm that Amex's anti-steering rules have "allowed all four networks to raise their swipe fees more easily and more profitably than would have been possible were merchants permitted to influence their customers' payment decisions," leading to "higher all-in merchant prices across the network services market." Pet. App. 207a. Because merchants pass those higher fees on to their customers, the economic burden is ultimately borne by all Americans in the form of higher retail prices.

a. Between 1997 and 2009, Visa and MasterCard increased their average merchant rates "by more than 20%." Pet. App. 210a. Because of the anti-steering rules, they did so "without fear of other networks undercutting their prices." *Ibid.* Between 2000 and 2007, Discover "was able to radically increase its merchant pricing," raising its average fee by nearly 24%. *Ibid.*; see *id.* at 206a. It, too, did so "with virtual impunity, relying on the restraining effect of anti-steering rules to ensure that it would not be undercut by a competitor offering a lower price." *Id.* at 210a.

In the early 2000s, price increases by Visa and MasterCard had reduced Amex's premium over the rates charged by its rivals. Pet. App. 166a. Although Amex's merchant fees "were already at or above the competitive level," Amex responded by further increasing its prices through the "Value Recapture" initiative. *Id.* at 167a. Between 2005 and 2010, Amex "repeatedly and

profitably raised its discount rates to millions of merchants across the United States * * * without losing a single large merchant and losing relatively few small merchants." *Id.* at 165a. The initiative included "at least twenty separate price increases," with several merchant segments "targeted for multiple rounds of price hikes." *Id.* at 167a.

Between 2007 and 2010, for example, Amex increased the discount rate charged to airlines "between 7% and 15%," which produced "over $90 million in additional pre-tax income." Pet. App. 167a; see *id.* at 167a-168a (describing similar increases imposed on restaurants). The Value Recapture initiative led to "a 9 basis point improvement to Amex's weighted average discount rate" and "$1.3 billion in incremental pre-tax income for Amex." *Id.* at 170a. The district court found that the anti-steering rules were "integral" to those price increases because they prevented merchants from responding to Amex's higher rates by steering transactions to other networks, or by using their ability to steer to negotiate lower rates from Amex. *Id.* at 208a-209a.

b. Retail consumers bear the ultimate economic burden of the anti-steering rules. The district court found that "[m]erchants facing increased credit card acceptance costs will pass most, if not all, of their additional costs along to their customers in the form of higher retail prices." Pet. App. 210a-211a. Those higher prices "affect not only those customers who use American Express cards, but also shoppers who instead prefer to pay using a lower-rewards [credit] card, debit card, check, or cash." *Id.* at 211a. Those other customers bear a portion of the cost of Amex's high-fees, high-rewards business model, "but do not receive any of the premium

rewards or other benefits conferred by American Express on the cardholder side of its platform." *Ibid.*

3. The anti-steering rules block low-fee rivals and suppress the development of innovative payment models

The district court further found that, by blocking price competition, the anti-steering rules make it "nearly impossible" for a new firm to enter the concentrated network-services market "by offering merchants a low-cost alternative to the existing networks" or an innovative alternative payment system. Pet. App. 203a.

a. Discover's experience vividly illustrates that point. Discover "launched in 1985 by offering a combination of breakthrough value propositions" for both cardholders and merchants. Pet. App. 203a. It charged no annual fee and was the first network to offer cardholder rewards, yet its merchant fees were "significantly below those of its competitors." *Id.* at 203a-204a; see *id.* at 154a n.24.

In 1999, "Discover saw an opportunity to leverage its position as the lowest-price network to gain share" from merchants who were dissatisfied because of "a series of price increases by its competitors." Pet. App. 204a. Discover launched "a 'major campaign' aimed at highlighting the pricing disparity between it and its competitors in order to persuade merchants to 'shift their business to Discover's lower-priced network.'" *Ibid.* (quoting Tr. 833) (brackets omitted). It "sent a letter to every merchant on its network, alerting them to their competitors' recent price increases and inviting the merchants to save money by shifting volume to Discover." *Ibid.* And Discover representatives "met with a number of larger merchants to offer discounts from the network's already lower prices if they would steer customers to Discover." *Ibid.*

The other networks' anti-steering rules thwarted Discover's attempt to translate its lower fees into greater market share. "In its conversations with a number of merchants, Discover learned that the [anti-steering rules] denied merchants the ability to express a preference for Discover or to employ any other tool by which they might steer share to Discover's lower-priced network." Pet. App. 205a. As a result, Discover's "major campaign" and significantly lower fees "failed to produce 'any significant movement in share.'" *Ibid.* (quoting Tr. 848).

In 2000, once it recognized the competitive environment created by the other networks' anti-steering rules, Discover "abandoned its low-price business model" and "began raising discount rates in order to more closely align its merchant pricing with that of Visa and MasterCard." Pet. App. 206a. As a Discover executive explained, the company had been "leaving money on the table" because "offering a lower price was not going to give Discover any business benefits." *Ibid.* (brackets and citation omitted). Discover thus increased its rates to match Visa's and MasterCard's—a correspondence that remains in effect today. *Ibid.*

b. More broadly, the district court found that the anti-steering rules have "stunted innovation" by blocking new payment models. Pet. App. 213a. In the early 2000s, Discover proposed a new network venture in which "merchants would receive equity in the network and be able to directly control their payment costs by influencing future pricing decisions." *Ibid.* But Discover abandoned the project "when it became clear that merchant-investors would be unable to encourage customers to use the preferred cards by traditional forms of steering." *Ibid.* Similarly, a group of large retailers

recently created a joint venture to develop a new mobile-device based payment platform that would "significantly reduce the participating merchants' payment processing costs." *Ibid.* But the venture's "capacity to develop a viable brand as the low-cost alternative to traditional [credit] cards is endangered by merchants' inability to 'compare and contrast' [the venture's] payment services with those offered by American Express." *Id.* at 214a (quoting Tr. 2436) (brackets omitted). The same would be true of other innovative alternative payment platforms. The district court thus found that the anti-steering rules "are responsible for impeding development of novel payment solutions that would have injected or potentially may inject greater diversification into the network services industry." *Ibid.*

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Far from "stimulat[ing] interbrand competition," *Leegin*, 551 U.S. at 890, Amex's anti-steering rules have had the opposite effect. After carefully examining "the relevant business," "its condition before and after the restraint was imposed," and "the restraint's history, nature, and effect," *State Oil*, 522 U.S. at 10, the district court found that the anti-steering rules have stifled interbrand price competition among networks, increased merchant fees, blocked low-fee rivals, and inflated the retail prices paid by all Americans. Those are particularly serious anticompetitive effects because price is the "central nervous system of the economy," *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940), and "competitive pricing [is] the free market's means of allocating resources," *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 23 (1979). The rules therefore are (at least) prima facie anticompetitive.

C. The Court Of Appeals' Alternative Market Definition Departed From Established Antitrust Principles And Provided No Sound Basis For Reversal In Any Event

The district court defined the relevant market in this case as the "market for general purpose credit and charge card network services" of the type that Amex provides to merchants. Pet. App. 112a. The court of appeals disagreed, holding that the market should include services to cardholders as well as services to merchants. *Id.* at 32a-33a. The court then held that the district court's market definition was "fatal to its conclusion that Amex violated [Section] 1." *Id.* at 31a. The court of appeals was mistaken on both counts.

As we explain below (see pp. 50-55, *infra*), the effects of the anti-steering rules on the related cardholder-services market are relevant to the ultimate determination whether the rules violate Section 1. Those effects are properly considered, however, not in deciding whether the United States and the States established a prima facie case, but in deciding whether Amex rebutted that case by proving sufficient procompetitive impact in an interdependent market. Maintaining that distinction is important, both because different parties bear the burden at the first two steps of the rule-of-reason analysis, and because the principles governing identification of the relevant market must be applied in a variety of antitrust contexts.

1. Services to merchants and services to cardholders do not belong in the same antitrust market because they are not substitutes

a. In many antitrust cases, courts define the "market" affected by the challenged action. In a merger case, for example, courts define the market in which the

challenged merger could "substantially lessen competition" in violation of the Clayton Act, 15 U.S.C. 18. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957). Defining the relevant market and measuring the defendant's market share is also the usual means of assessing market power under both Section 1 and Section 2 of the Sherman Act. See, *e.g.*, *Kodak*, 504 U.S. at 464 (Sections 1 and 2); *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956) (*du Pont*) (Section 2).

In all of those contexts, the purpose of defining the market is to identify the products that compete with the defendant's products. Consistent with that purpose, an antitrust market consists of those products "that have reasonable interchangeability for the purposes for which they are produced," such that customers would switch from one to another if faced with a price increase. *du Pont*, 351 U.S. at 404; see, *e.g.*, *Kodak*, 504 U.S. at 482; *United States* v. *Continental Can Co.*, 378 U.S. 441, 449 (1964); *Times-Picayune Publ'g Co.* v. *United States*, 345 U.S. 594, 612 n.31 (1953) (*Times-Picayune*). In other words, "a relevant market consists only of goods that are reasonably close *substitutes* for one another." 2B Areeda & Hovenkamp ¶ 565a, at 430 (4th ed. 2014); accord *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986) (Bork, J.) ("[T]he definition of the 'relevant market' rests on a determination of available substitutes."), cert. denied, 479 U.S. 1033 (1987).

This Court's decision in *Continental Can* illustrates the application of the rule that market definition turns on the identification of substitutes. The United States challenged a merger between "the Nation's second largest producer of metal containers" and its "third largest

producer of glass containers." 378 U.S. at 443. The district court rejected the challenge, concluding that the merger would not substantially lessen competition in any market because metal and glass containers were, with one exception, separate markets. *Id.* at 448-449. This Court reversed, holding that metal and glass containers belonged in the same market because of the pervasive "competition between them for the same end uses" and evidence that many customers regarded them as "interchangeable." *Id.* at 453-456.

b. In this case, the court of appeals articulated the correct legal standard, stating that the market should be defined to include "products 'reasonably interchangeable by consumers for the same purposes.'" Pet. App. 32a (citation omitted). But the court never explained how the services that Amex provides to merchants are "reasonably interchangeable" with the services it provides to cardholders. In fact, they are not.

Amex enables cardholders to make purchases without cash and to defer payment, and it provides cardholders with related services such as credit, fraud protection, and rewards. Pet. App. 74a-75a, 89a-90a. In contrast, Amex provides merchants with guaranteed payment and related payment-processing services. *Id.* at 82a-84a. Those two sets of services are undoubtedly related, and both sets are used when an Amex cardholder makes a purchase from an Amex-accepting merchant. But the two bundles of services are not substitutes in any sense. A beverage company facing an increase in the price of glass bottles could switch to metal cans, but a merchant facing an increase in Amex's fees could not become an Amex cardholder instead.

Rather than faithfully applying the "reasonably interchangeable" standard, the court of appeals emphasized that Amex's competition for merchants and its competition for cardholders are interdependent. Thus, the court observed that "the price charged to merchants necessarily affects cardholder demand, which in turn has a feedback effect on merchant demand." Pet. App. 39a. But it is common for prices in one market to affect prices in another. That sort of indirect effect does not mean that the relevant products should be collapsed into a single market for purposes of antitrust analysis. See, *e.g.*, *Kodak*, 504 U.S. at 463, 481-482 (distinguishing the markets for photocopier replacement parts and services from the market for photocopiers). The leading antitrust treatise thus specifically disapproves of the court of appeals' approach in this case, emphasizing that "the fact that a firm obtains its profits from two different, non-substitutable groups does not serve to place the two groups into the same market." Areeda & Hovenkamp ¶ 565, at 104 (Supp. 2017).[7]

The court of appeals also placed great weight on the fact that the credit-card industry is two-sided. Pet. App. 39a-40a. But distinct competitions on different sides of a two-sided platform are properly analyzed as separate, albeit interdependent, antitrust markets. That point is well illustrated by this Court's decision in

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[7] An antitrust case may implicate multiple, separate markets composed of products that are not substitutes. For example, a merger in the shoe industry could affect separate markets for "men's, women's, and children's shoes." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 326 (1962). But the proper course in such a circumstance is not to depart from settled market-definition principles by collapsing the affected markets; it is to consider the impact of the challenged action in each of the relevant markets. *Id.* at 325-326.

Times-Picayune, which involved a newspaper publisher's requirement that advertisements appear in both its morning and evening papers. The Court explained that "every newspaper is a dual trader in separate though interdependent markets" serving advertisers and readers. 345 U.S. at 610. But because the challenged restraint "concern[ed] solely one of these markets," the Court limited the relevant market to reasonable substitutes for newspaper advertising; it did not treat the two sides of the platform taken together as a single market. *Ibid.*; see *id.* at 612 & n.31.[8]

Like the markets for newspaper advertisers and readers, the markets for merchants and cardholders are distinct spheres of competition, "involving different sets of rivals and the sale of separate, though interrelated, products and services to separate groups of consumers." Pet. App. 119a. In the market for merchants, Amex competes with the acquirers affiliated with Visa, MasterCard, and Discover (which offer merchants terms that are largely dictated by the networks). *Id.* at 81a-82a. In the market for cardholders, in contrast, Amex competes with Discover and with Citibank, Chase, and the thousands of other banks that issue cards on the Visa and MasterCard networks. *Id.* at 84a. By collapsing those

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[8] The court of appeals stated that the district court, in assessing the extent to which an increase in merchant fees would cause a shift to other forms of payment, had failed adequately to consider "feedback effect[s]" between the merchant and cardholder markets. Pet. App. 39a. In fact, the district court *did* consider the possibility of such "cross-platform feedback effects." *Id.* at 126a. And in any event, the analysis at issue was relevant only to Amex's argument that the relevant market should be defined to include debit-card services as well as credit-card services—a contention that Amex "abandoned" on appeal. *Id.* at 5a n.1.

very different avenues of competition into a single market, the court of appeals severed market definition from its purpose and "prevent[ed] the relevant-market inquiry from accurately answering the questions for which it is asked." Antitrust Law Professors' Cert. Amicus Br. 5.

c. Amex concedes (Br. in Opp. 16) that services to merchants and services to cardholders "cannot [be] substitute[d]" for one another. Instead, it asserts (*ibid.*) that those two sets of services are, in reality, "*part of the same product*," akin to "[m]atching left and right shoes." The court of appeals did not adopt that argument, and it is incorrect. Amex relies on this Court's observation that it may be appropriate "to combin[e] in a single market a number of different products or services where that combination reflects commercial realities." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 572 (1966) (brackets omitted). But that principle applies to related products and services that are offered *to the same consumers*—in *Grinnell*, centrally monitored "burglar alarm" and "fire alarm" services. *Ibid.* Here, in contrast, services to merchants and services to cardholders are sold separately to distinct groups of consumers. Amex cites no precedent placing such services in a single antitrust market.

2. The facts found by the district court established a prima facie case even under the court of appeals' market definition

In any event, the district court's findings that the anti-steering rules stifle price competition, inflate merchant fees, and block low-fee rivals were sufficient to establish a prima facie case even under the court of appeals' definition of the relevant market. When a court finds that a restraint has had "actual, sustained adverse

effects on competition," "specific findings * * * concerning the definition of the market" are unnecessary. *Indiana Dentists*, 476 U.S. at 460-461. The Court thus need not resolve the market-definition question in order to hold that the United States and the States carried their initial burden.

The district court found that Amex's anti-steering rules have "frustrated [interbrand price competition] to the point of near irrelevance," inflating the merchant fees charged by all four networks. Pet. App. 195a. That distortion of competitive pricing, the "central nervous system of the economy," *Socony-Vacuum Oil*, 310 U.S. at 226 n.59, would be a matter of serious antitrust concern even if the networks competed for cardholders by expending all of their merchant fees on more generous cardholder rewards.

This Court made a version of the same point in *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980) (per curiam). There, a group of wholesalers had agreed among themselves to demand immediate payment from retailers, eliminating the practice of affording "short-term trade credit" on negotiated terms. *Id.* at 643. The Court acknowledged that, "in a competitive market," the elimination of trade credit would, in theory, "ultimately lead * * * to corresponding decreases in the invoice price." *Id.* at 649. The Court nonetheless held that the agreement was *per se* unlawful because credit terms are "an inseparable part of the price," *id.* at 648, and the agreement "extinguish[ed] one form of competition among the sellers," *id.* at 649.

Although *Catalano* was a *per se* case, it illustrates that a restraint that extinguishes price competition can be anticompetitive even if "the agreement relates only to one component of an overall price." *O'Bannon* v.

NCAA, 802 F.3d 1049, 1071 (9th Cir. 2015), cert. denied, 137 S. Ct. 277 (2016). "By effectively suppressing competition on merchant pricing," Amex's anti-steering rules "shift the bulk of interbrand competition in the credit and charge card industry to the cardholder side of the platform." Pet. App. 238a. The anti-steering rules are analogous to "a decision made by [Amex] on behalf of all participants in the network services market that networks will not compete * * * by lowering their merchant pricing" and will instead "focus their competitive efforts on cardholders." *Id.* at 240a.

Even with respect to the cardholder side of the platform, the anti-steering rules have the additional effect of limiting the *bases* on which the various networks can compete for cardholders. If steering were permitted, and if merchants adopted a widespread practice of offering more favorable terms of sale to cardholders who used lower-cost cards, the card issuers could compete for cardholder business by emphasizing that potential advantage. Amex's preferred strategy is to charge high merchant fees and offer premium cardholder rewards. Pet. App. 238a-239a. But other networks might choose instead to compete for cardholders by encouraging merchant steering practices that will make their own cards more desirable. The anti-steering rules effectively preclude that form of competition.

There is, of course, nothing improper about Amex's strategy of pairing high merchant fees with premium cardholder rewards. But the range of options available to both merchants and cardholders will be increased if other networks remain free to pursue a different strategy. Cf. *Leegin*, 551 U.S. at 890 (identifying, as one procompetitive effect of vertical resale price maintenance, that such price maintenance "has the potential to give

consumers more options so that they can choose among low-cost, low-service brands; high-price, high-service brands; and brands that fall in between"). As the district court correctly recognized, Amex may not "decide on behalf of the entire market which legitimate forms of interbrand competition should be available and which should not." Pet. App. 240a.

D. The Additional Showings Demanded By The Court Of Appeals Were Not Required

The court of appeals deemed the district court's findings legally insufficient to establish even a prima facie case because—in the court of appeals' view—the district court did not adequately account for the anti-steering rules' purported benefits to Amex cardholders. At times, the court appeared to fault the United States and the States for failing to identify and negate *all* possible benefits of the anti-steering rules at the first step of the burden-shifting framework. At other times, the court appeared to hold that the United States and the States were required to provide a precise calculation of Amex's "two-sided" price, taking into account both its merchant fees and its cardholder rewards—something that even Amex itself could not reliably do. Neither of those showings was required.

1. The United States and the States were not required to negate the anti-steering rules' potential benefits for cardholders in order to establish a prima facie case

The court of appeals stated that the United States and the States bore the "initial burden" of "show[ing] that the [anti-steering rules] made *all* Amex consumers on both sides of the platform—*i.e.*, both merchants and cardholders—worse off overall." Pet. App. 51a. The

court also stated that, in order to carry their initial burden, the United States and the States were required "to take into account offsetting benefits to cardholders" and "to prove net harm" to cardholders and merchants. *Id.* at 49a n.52, 54a. To treat such showings as essential elements of a Section 1 plaintiff's prima facie case would seriously distort the applicable burden-shifting framework and subvert fundamental antitrust principles.

a. A plaintiff's initial burden in a rule-of-reason case is to show that the challenged restraint is "*prima facie* anticompetitive." *California Dental*, 526 U.S. at 771. Such a showing "place[s] the burden of procompetitive justification on [the defendant]," *ibid.*, which is responsible for establishing any "legitimate justifications," *Actavis*, 133 S. Ct. at 2236; see Areeda & Hovenkamp ¶ 1505, at 171 (Supp. 2017). Whatever the merits of Amex's claim that the anti-steering rules have "offsetting benefits to cardholders," Pet. App. 49a n.52, that argument is not relevant at the first step of the burden-shifting inquiry. It is the defendant's burden to establish a challenged restraint's procompetitive benefits, not the plaintiff's initial burden to anticipate and refute them.[9]

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[9] In one sentence of its opinion, the court of appeals acknowledged that "[w]hether the [anti-steering rules] had pro-competitive effects on cardholders—let alone whether any alleged procompetitive effects on cardholders outweigh 'anticompetitive' effects on merchants—has no bearing on whether [the United States and the States] carried their initial burden." Pet. App. 51a. That statement, however, came only two sentences after the court's assertion that the United States and the States bore the "initial burden" of "show[ing] that the [anti-steering rules] made *all* Amex consumers on both sides of the platform * * * worse off overall." *Ibid.*

b. The court of appeals' analysis also reflected a misunderstanding of the nature of the harm that the Sherman Act seeks to prevent. Although the Sherman Act is a "consumer welfare prescription," *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting Robert H. Bork, *The Antitrust Paradox: A Policy at War With Itself* 66 (1978)), courts do not enforce that prescription by making their own judgments about the allocation of resources that would best serve consumers' interests. Instead, consistent with the Sherman Act's fundamental policy of market competition, courts protect consumers by protecting *the competitive process*. As Robert H. (later Justice) Jackson explained while serving as the head of the Antitrust Division, "[t]he antitrust laws represent an effort to avoid detailed government regulation of business by keeping competition in control of prices." Robert H. Jackson, *Should the Antitrust Laws Be Revised?*, 71 U.S. L. Rev. 575, 576 (1937). Accordingly, antitrust law "assesses both harms and benefits in light of the [Sherman] Act's basic objective, the protection of a competitive process." *Clamp-All Corp.* v. *Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 486 (1st Cir. 1988) (Breyer, J.), cert. denied, 488 U.S. 1007 (1989).

The court of appeals' reasoning reflects a serious departure from that fundamental principle. The court stated, for example, that the lower merchant fees that would result from eliminating the anti-steering rules could harm Amex cardholders by decreasing Amex's "optimal level of cardholder benefits." Pet. App. 50a. Under the Sherman Act, however, the optimal mix of goods and services is set through market competition, and the courts' role is to protect the competitive process. As the leading treatise explains, the Second Circuit erred in this case by failing to recognize that "under

antitrust policy *competition* should choose the optimal mix of revenue as between the two sides" of Amex's platform. Areeda & Hovenkamp ¶ 562e, at 101 (Supp. 2017).

c. The court of appeals appeared to base its contrary approach on circuit precedent stating that a rule-of-reason plaintiff must establish that the challenged restraints have "an actual adverse effect on competition *as a whole* in the relevant market." Pet. App. 49a-50a (quoting *K.M.B. Warehouse Distribs., Inc.* v. *Walker Mfg. Co.*, 61 F.3d 123, 127 (2d Cir. 1995)). But the court misunderstood the principle on which it relied. The statement that an antitrust plaintiff must demonstrate harm to competition "as a whole" simply means that a plaintiff "must allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself." *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 135 (1998). That requirement follows from the axiom that "[t]he purpose of the antitrust laws * * * is 'the protection of *competition*, not *competitors*.'" *Leegin*, 551 U.S. at 906 (citation omitted). This Court has never suggested, however, that the Sherman Act requires a showing of "net harm" to all consumers in the market.[10] Instead, what is required is proof of harm "to the competitive process." *NYNEX*, 525 U.S. at 135. A showing that a restraint disrupts the market's price-setting mechanism, stifles interbrand price competition, and raises fees amply satisfies that standard.

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[10] Until this case, the Second Circuit had interpreted the requirement of a showing of harm to competition "as a whole" to mean simply that "evidence that plaintiffs have been harmed as individual competitors will not suffice." *Geneva Pharms. Tech. Corp.* v. *Barr Labs. Inc.*, 386 F.3d 485, 507 (2004); see *K.M.B. Warehouse Distribs.*, 61 F.3d at 127-128.

2. The United States and the States were not required to calculate Amex's "two-sided" price in order to establish a prima facie case

The court of appeals also deemed the district court's findings insufficient to establish a prima facie case because the United States and the States had not provided "a reliable measure of [Amex's] two-sided price that appropriately accounts for the value or cost of the rewards paid to cardholders." Pet. App. 53a (citation omitted). That is incorrect for at least three reasons.

First, proof of an increase in Amex's "two-sided price" was not necessary to establish a prima facie case of anticompetitive effects. "Two-sided platforms compete, in part, via the prices offered by each platform to the two sides. For example, one hotel booking service may charge a high price to hotels and a relatively low price to travelers," while others may do the reverse. Economists Cert. Amicus Br. 11. "Competition is likely to result in competing platforms offering different price pairs, and those offering the price pairs that best satisfy consumer preferences will thrive." *Ibid.* The court of appeals committed "a fundamental economic error" by holding that the metric of competitive effects in such an industry is "whether the *sum* of the two prices increased." *Ibid.* Where, as here, restraints "prevent[] competitive market forces from determining the price pairs offered by the competing platforms," "anticompetitive harm" exists "regardless of whether the sum of the prices increases, decreases, or remains unchanged." *Id.* at 11-12. The harm is the distortion of the market process.

Second, and in any event, the district court's findings *did* establish that Amex's "two-sided" price was inflated above competitive levels. During the Value Recapture

initiative, Amex increased fees that were "already at or above the competitive level" to re-establish its price premium over its rivals' elevated rates. Pet. App. 167a; see *id.* at 167a-170a, 174a-176a. Because those increased fees "were not paired with offsetting adjustments on the cardholder side of the platform, the resulting increases in merchant pricing are properly viewed as changes to the net price charged across Amex's integrated platform." *Id.* at 166a-167a. The court of appeals recognized, and "Amex conceded," that "not all of Amex's gains from increased merchant fees are passed along to cardholders in the form of rewards." *Id.* at 51a. In fact, Amex spends less than half of its merchant fees on cardholder rewards. *Id.* at 210a-211a; see Tr. 3853.

The court of appeals did not question the district court's conclusion that the anti-steering rules increased Amex's two-sided price. Instead, the court faulted the United States and the States for failing to calculate "a reliable *measure* of [Amex's] two-sided price." Pet. App. 51a (quoting *id.* at 174a n.30) (emphasis added). But the district court found that, because of the complexity of Amex's system of cardholder rewards and the difficulty of quantifying some of those rewards, "neither party" had provided a reliable measure of that two-sided price. *Id.* at 209a; see *id.* at 182a-186a. The United States and the States should not be faulted for failing to calculate with precision a measure of Amex's pricing that Amex itself could not reliably provide. To the contrary, because any procompetitive effects on the cardholder market are properly considered at the *second* step of the rule-of-reason analysis, at which Amex bore the burden of rebutting the prima facie case, uncertainty as to the scope of those benefits must be resolved against Amex.

Third, the court of appeals erred in focusing exclusively on *Amex's* pricing. The district court also found that the anti-steering rules have "enabled [Amex's] competitors to charge higher * * * fees" and have blocked low-cost rivals. Pet. App. 210a. Most obviously, the rules thwarted Discover's low-fee strategy and then allowed Discover "to radically increase its merchant pricing over a relatively short period of time," *ibid.*, to avoid "'leaving money on the table,'" *id.* at 206a (citation omitted). Restraints that enable such unfettered price increases would properly be deemed prima facie anticompetitive even if (counterfactually) they had not increased *Amex's* two-sided price.

That is particularly true because supracompetitive prices are merely one means of establishing anticompetitive effects. The ultimate question is whether the challenged restraint has harmed "the competitive process." *NYNEX*, 525 U.S. at 135; accord *NCAA*, 468 U.S. at 104. The district court's findings were more than sufficient to establish that the anti-steering rules have harmed the competitive process in the credit-card industry.[11]

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[11] In addition to its focus on Amex's two-sided price, the court of appeals deemed it significant that output in the credit-card industry, as measured by the dollar value of credit-card transactions, has increased. Pet. App. 52a. "[O]utput reductions are one common kind of anticompetitive effect in antitrust cases," but "a 'reduction in output is not the *only* measure of anticompetitive effect.'" *O'Bannon*, 802 F.3d at 1070 (citation omitted). Transaction volume is a particularly unilluminating metric here, because the anti-steering rules have severed the normal link between "merchants' demand for network services and the price charged," and thus have prevented volume from responding normally to price changes. Pet. App. 195a.

E. The District Court Properly Considered And Rejected, At The Second Step Of The Burden-Shifting Inquiry, Amex's Arguments About The Benefits Of The Anti-Steering Rules For Cardholders

The court of appeals' approach to this case appears to have been driven in part by its recognition that antitrust analysis of the anti-steering rules should take account of the "two-sided" nature of Amex's platform. "In a two-sided platform, a single firm or collection of firms sells different products or services to two separate yet interrelated groups of customers who, in turn, rely on the platform to intermediate some type of interaction between them." Pet. App. 77a. Such two-sided platforms are not new, but their importance has grown in recent years as "a seemingly endless array of Internet companies" have developed to "facilitate some form of value-generating interaction between distinct sets of consumers." *Id.* at 77a-78a; see generally Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. Econ. 645 (2006); Kate Collyer et al., *Measuring Market Power in Multi-Sided Markets*, Antitrust Chronicle (Sept. 2017).

The court of appeals believed that excluding services to cardholders from the relevant market would allow "legitimate competitive activities in the market for [cardholders] to be penalized no matter how output-expanding such activities may be," so long as those activities had some anticompetitive effects in the market for merchants. *Id.* at 35a. The court's concern about the interdependence of the two sides of the credit-card platform was appropriate. As we explain above (see pp. 43-46, *supra*), however, the court erred in requiring the United States and the States to negate Amex's claim

that the anti-steering rules have procompetitive benefits in the market for cardholders at the first (*i.e.*, prima facie case) step of the rule-of-reason analysis. Instead, Amex's asserted procompetitive justifications are properly considered (as the district court considered them) at the second step of the burden-shifting inquiry. This Court should vacate the judgment below, which held that the United States and the States failed to establish a prima facie case. On remand, the court of appeals can consider any challenges that Amex has properly preserved to the district court's holding that Amex failed to establish sufficient procompetitive justifications for the anti-steering rules.

1. Although courts applying the rule of reason ordinarily confine their analysis of procompetitive benefits to the market in which the challenged restraint operates, this Court has not rigidly adhered to that limitation. In *NCAA*, for example, the Court recognized that "most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics," a product that competes with other forms of entertainment in markets that are distinct from the markets restrained by the NCAA's rules governing "the eligibility of participants" and other similar matters. *NCAA*, 468 U.S. at 117. The Court rejected the NCAA's defense of the restraint at issue—limits on televised football games—only because that restraint was "not even arguably tailored to serve such an interest" in competitive balance. *Id.* at 119. Other courts have likewise "balance[d] the anticompetitive effects on competition in one market with certain procompetitive benefits in other markets." *Sullivan* v. *NFL*, 34 F.3d 1091, 1112

(1st Cir. 1994), cert. denied, 513 U.S. 1190 (1995); see, *e.g.*, *O'Bannon*, 802 F.3d at 1057-1058, 1072-1074 (considering procompetitive justifications in other markets in assessing the reasonableness of an NCAA rule restricting the markets for "college education" and "group licensing" of the rights to use athletes' names, images, and likenesses).

2. A rigid rule holding that a court analyzing a restraint on one side of a two-sided platform is always barred from considering asserted procompetitive benefits on the other side of the platform would risk condemning as unlawful business practices that actually serve valid procompetitive purposes. Cf. *Leegin*, 551 U.S. at 875 (explaining that *per se* rules "can increase the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage"); *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) ("Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'") (citation omitted). Instead, a court should consider out-of-market effects at the second step of its rule-of-reason analysis if, but only if, the defendant shows that the challenged restraint is reasonably necessary to achieve legitimate procompetitive benefits in a closely related and interdependent market.

That standard is in some respects analogous to the ancillary-restraints doctrine, which "governs the validity of restrictions imposed by a legitimate business collaboration, such as a * * * joint venture, on nonventure activities." *Texaco, Inc.* v. *Dagher*, 547 U.S. 1, 7 (2006). When a restraint is ancillary to a legitimate collaboration, both are "typically evaluated as a whole under the

rule of reason." *Major League Baseball Props., Inc.* v. *Salvino, Inc.*, 542 F.3d 290, 338 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment). "To be ancillary," a restraint must be "subordinate and collateral to a separate, legitimate transaction," and *reasonably necessary* to "make the main transaction more effective in accomplishing its purpose." *Rothery Storage*, 792 F.2d at 224, 227. "Ancillary restraints are generally permitted if they are 'reasonably necessary' toward the contract's objective of utility and efficiency." *Schering-Plough Corp.* v. *FTC*, 402 F.3d 1056, 1072 (11th Cir. 2005), cert. denied, 548 U.S. 919 (2006). But when a restraint is "not reasonably necessary to achieve any of the efficiency-enhancing purposes of a joint venture, it will be evaluated apart from the rest of the venture." *Salvino*, 542 F.3d at 338 (Sotomayor, J., concurring in the judgment).

3. The district court's analysis in this case was consistent with those principles. The court recognized the interdependence between the two sides of Amex's platform. Pet. App. 121a-122a. And at the second step of the burden-shifting framework, the district court considered all of Amex's proffered procompetitive justifications for its anti-steering rules, including those in "the interrelated but distinct [card-]issuing market." *Id.* at 239a. The court concluded, however, that Amex had failed to carry its burden to show that the anti-steering rules were "reasonably necessary to robust competition on the cardholder side," or that "any such gains offset the harm done in the network services market." *Id.* at 240a. The court found Amex's procompetitive justifications to be legally invalid, factually unsupported, or both. *Id.* at 228a-258a.

The district court considered in particular Amex's argument that, if steering were permitted, Amex's revenues would decline and the company would be less able to compete in the cardholder market. See Pet. App. 229a-233a. The court viewed it as inconsistent with the policies of the Sherman Act "[t]o find the [anti-steering rules] to be reasonable restraints on trade because they shield American Express's preferred business strategy from a legitimate form of interbrand competition." *Id.* at 235a. The court also stated that, assuming that benefits to competition in the cardholder market could be balanced against a loss of competition in the network-services market, Amex had "failed to establish that [anti-steering rules] are reasonably necessary to robust competition on the cardholder side of the * * * platform, or that any such gains offset the harm done in the network services market." *Id.* at 239a-240a. And the court also noted, at an earlier stage of its opinion, that the retail price increases caused by Amex's anti-steering rules are borne by many consumers who are not Amex cardholders and therefore derive no benefit from Amex's more generous rewards program. *Id.* at 210a-212a.

4. With one exception not relevant here, all of Amex's arguments on appeal focused on the first step of the burden-shifting process. Amex C.A. Br. 37-79. The court of appeals agreed with Amex that the United States and the States had failed to establish a prima facie case under Section 1. For the reasons set forth above, that holding was erroneous. Although benefits to cardholders are potentially relevant to the rule-of-reason analysis in this case, they are appropriately considered at the second rather than the first step of the burden-shifting framework. This Court therefore should vacate the court of appeals' judgment holding that the

United States and the States failed to establish a prima facie case. On remand, the court of appeals may consider any properly preserved challenges to the district court's holdings concerning procompetitive justifications.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals for further proceedings.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
MAKAN DELRAHIM
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
BRIAN H. FLETCHER
Assistant to the Solicitor General
WILLIAM J. RINNER
Counsel to the Assistant Attorney General
KRISTEN C. LIMARZI
ROBERT B. NICHOLSON
JAMES J. FREDRICKS
CRAIG W. CONRATH
JOHN R. READ
NICKOLAI G. LEVIN
ANDREW J. EWALT
Attorneys

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No. 16-1454

In the Supreme Court of the United States

STATES OF OHIO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MONTANA, RHODE ISLAND, UTAH, AND VERMONT,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, AND AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS AND RESPONDENTS NEBRASKA, TENNESSEE, AND TEXAS

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor
HANNAH C. WILSON
Deputy Solicitor
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@ohioattorneygeneral.gov

Counsel for Petitioner
State of Ohio

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The district court's factual findings show that Amex's anti-steering provisions have harmed consumers on both sides of the credit-card platform. On the merchant side, they have stifled interbrand price competition. Pet. App. 194a-203a. The anti-steering provisions have deterred Amex's rivals from reducing prices because the provisions prevent those price cuts from generating greater market share. Tr. 849 (Hochschild/Discover). As a result, Amex's provisions have raised the prices that the *entire* credit-card industry charges merchants. Pet. App. 207a.

On the cardholder side, these price increases have led merchants to raise retail prices. *Id.* at 210a-12a. And, with the anti-steering provisions in place, merchants generally have charged the same price no matter the payment type, so consumers using high-cost cards unknowingly shift part of their costs to those using cheaper methods. *Id.* Given this "negative externality," consumers do not value rewards from high-cost cards at their full costs (including the costs imposed on others). To prevent consumers from internalizing these costs, moreover, the anti-steering provisions reduce consumer choices. They bar cardholders from receiving, say, an offer for a 1% discount for using a cheaper card (and from accepting that offer if they value it more than any rewards).

As the States' opening brief noted, the Government proved anticompetitive harm because Amex's provisions restrict interbrand price competition and raise the credit-card industry's merchant fees. In response, Amex departs from the Second Circuit's sole reliance on the credit-card platform's two-sided nature. And it disregards the distinct ways to prove "market power" because its ability to affect industrywide prices directly illustrates its power here.

I. AMEX'S DEPARTURE FROM THE SECOND CIRCUIT'S LOGIC CONFIRMS THE COURT'S ERROR

The Second Circuit did not dispute the district court's *factual* findings about the pricing effects of Amex's restraints; it ruled that those findings were *legally* insufficient. Pet. App. 49a-50a. It also did not claim that anti-steering provisions have the same effects as vertical restraints in *one-sided* markets; it relied on the credit-card platform's *multi-sided* nature. *Id.* at 7a-10a, 39a, 49a. In both respects, Amex now departs from the decision it defends.

A. Amex Wrongly Disputes Facts

Amex repeatedly challenges (at 28, 50, 56) the district court's factual findings. Yet it had a duty at the certiorari stage to identify factual disputes that could implicate the question presented—whether the anti-steering provisions' pricing effects met the Government's burden to show anticompetitive harm. Sup. Ct. R. 15.2. Instead, Amex conceded that the decision below rested on the conclusion that the district court's factual findings were legally insufficient, not on any disagreement with them. Br. in Opp. 10 n.1. Its failure to contest the findings "at the certiorari stage waived [its] right to do so at the merits stage." *District of Columbia v. Wesby*, No. 15-1485, slip op., at 4 n.1 (U.S. Jan. 22, 2018).

Besides, Amex's claims lack merit. It must meet a heavy burden to overcome "the deferential 'clear error' standard." *Glossip v. Gross*, 135 S. Ct. 2726, 2739 (2015); *cf. NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 98 n.15 (1984). It cannot do so.

First, Amex argues (at 28) that "the record contradicts the premise that the nondiscrimination provisions cause merchants to pay higher fees." Yet the district court found as a fact that the "restraints have resulted in higher all-in merchant prices across the network services market." Pet. App. 207a. The evidence supported this finding. Discover's president explained that anti-steering provisions deter price cuts by preventing networks from increasing share through lower prices. Tr. 849 (Hochschild/Discover). That has caused all four networks to raise prices. *Id.* at 854; J.A. 224; Tr. 224 (Thiel/Alaska Airlines); Tr. 1222-23 (Kimmet/Home Depot). As its contrary evidence, Amex claims (at 28) that the prices for merchants that do not accept Amex did not decline after Visa and MasterCard lifted their anti-steering provisions. The district court found the evidentiary value of this alleged "experiment" insignificant given the small size of those particular merchants. Pet. App. 223a-25a. That was not clearly erroneous.

Second, Amex asserts (at 56) that Discover's efforts to inject price competition failed because of Discover's "low cardholder benefits, the ubiquity of Visa and MasterCard, and technical limitations." Yet the district found as a fact that anti-steering provisions doomed Discover's price cuts. Pet. App. 204a-06a. Merchants told Discover that the provisions were the reason they could not shift share to it. Tr. 848-49 (Hochschild/Discover). So, at trial, Amex did "not strenuously dispute the evidence regarding the effect of anti-steering rules on Discover's low-price model." Pet. App. 205a.

Third, Amex claims (at 50) a lack of "proof" that merchants pass on higher prices to customers. Yet

the district court found as a fact that higher fees increase retail prices. Pet. App. 210a-12a. That followed from expert testimony. J.A. 224. And it followed from merchant testimony noting that credit-card costs affect retail prices. *E.g.*, Tr. 1278 (Kimmet/Home Depot); Tr. 1406 (Rein/Walgreens); Tr. 1544 (O'Malley/Best Buy); Tr. 3150 (Gibson/Sinclair).

Amex's newfound need to fight the district court's findings is telling. It confirms the weakness of the Second Circuit's holding once the Court accepts those findings (as it must at this stage).

B. Amex Wrongly Equates Its Vertical Restraints With Vertical Restraints From Other Cases

Amex claims (at 24-29) that its provisions have the same efficiency justifications as restraints that a manufacturer imposes on distributors. It misses the key insights from cases about these restraints. And its attempt to fit its provisions into their mold—going so far as referring to merchants as Amex "distributors"—further departs from the decision below.

1. The Court has switched to the rule of reason for resale price maintenance, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007), and divisions of retail territory, *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57-59 (1977). Amex suggests (at 25) that these cases permit manufacturers to use vertical restraints to limit *interbrand* competition. They stand for no such thing.

The cases recognize that "'the primary purpose of the antitrust laws is to protect'" interbrand competition, and that these restraints limit *only* "intrabrand

competition—the competition among retailers selling the same brand." *Leegin*, 551 U.S. at 890 (citation omitted). Intrabrand limits fix a "free-rider" problem in which no-frills retailers benefit from the higher demand for a product generated by high-service retailers, but undercut the prices that those retailers charge. *Id.* at 890-91. Left unchecked, free riding could curtail services even if consumers valued them above their costs. *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358, 369 (7th Cir. 1987). Intrabrand limits thus can increase interbrand competition by allowing consumers to "choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between." *Leegin*, 551 U.S. at 890.

Because these restraints do not restrict interbrand competition, that competition acts as a "check" against any higher prices charged by firms using them. If consumers do not value the services at their price increases, "[i]nterbrand competition would divert [those] consumers to lower priced substitutes." *Id.* at 897. For that reason, manufacturers have no incentive to give retailers unjustified margins. "The difference between the price a manufacturer charges retailers and the price retailers charge consumers represents part of the manufacturer's cost of distribution, which, like any other cost, the manufacturer usually desires to minimize." *Id.* at 896.

2. Amex's provisions lack these attributes. They have not restricted *intrabrand* competition among downstream sellers of Amex (like issuers or acquirers); they have "frustrated to the point of near irrelevance" *interbrand* price competition between Amex, Visa, MasterCard, and Discover. Pet. App. 195a.

That is why the word "intrabrand" appears nowhere in Amex's brief. Amex's provisions thus implicate the antitrust laws' primary purpose.

Leegin also rebuts Amex's claim (at 27) that it may "enhance[] its ability to compete with" Visa, MasterCard, and Discover by blocking that competition in an area in which it could otherwise occur. That case did not suggest that a high-service manufacturer could use vertical restraints to restrict price competition from *other manufacturers* out of concern that its rivals' low prices would undercut its service "investments." Instead, the rivals' competition ensured that consumers could switch to cheaper brands if they did not value those services. 551 U.S. at 890, 896. Here, by contrast, "[n]o automatic mechanism corrects blunders." *Premier Elec.*, 814 F.2d at 369. Amex has eliminated the safety valve (interbrand competition) that *Leegin* found important by barring rivals from undercutting Amex's prices: Merchants cannot give a credit-card network greater share for lower prices because consumers make payment decisions. Pet. App. 203a-07a. And consumers make those decisions not because they value cardholder rewards at their actual costs, but because others pick up a part of the tab. *Id.* at 212a.

Likewise, Amex mistakenly relies on the claim (at 27) that limits on interbrand price competition on the merchant side of the platform "foster intense competition" on the cardholder side. "This is not the kind of procompetitive virtue contemplated under the Act, but rather [a] mere consequence of limiting price competition." *United States v. Brown Univ.*, 5 F.3d 658, 675 (3d Cir. 1993); Alan Frankel & Allan Shampine, *The Economic Effects of Interchange Fees*,

73 Antitrust L.J. 627, 634 n.25 (2006). Tellingly, Amex ignores the argument that price cartels would "channel" interbrand competition to unrestricted areas (like rewards) in the same way. If such channeling is "valid" here, it should be "valid" there. But, as the States noted (at 41-52), the Court has rejected similar arguments because the "channeling" of *interbrand* competition generally harms consumers. *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649 (1980); Richard Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6, 20 (1981).

Amex also incorrectly equates (at 27-29) *steering merchants* with *free-riding retailers*. Merchants do not "free ride" on Amex benefits if they steer customers to cheaper cards. Unlike in *Leegin*—where customers could partake of the high-service retailer's services *and* purchase the product elsewhere—customers receive Amex rewards only by using Amex. Pet. App. 255a-56a. They do not earn Amex frequent flyer miles when using Discover. Indeed, Amex has things backwards. As the States noted (at 49), its anti-steering provisions incorporate "free riding" into its product. If a card's benefits are worth its costs, cardholders would choose Amex over competing merchant offers *even with steering*. Anti-steering provisions ensure that consumers partially make decisions based on cross-subsidies from others.

Amex next mistakenly invokes (at 29) *Leegin*'s recognition that manufacturer and consumer interests are aligned over *retailer* prices. 551 U.S. at 896. *Leegin* did not claim that manufacturer and consumer interests are aligned over *manufacturer* prices. And Amex's provisions raise *credit-card prices* (which

are the equivalent of manufacturer prices here). If anything, consumers are generally aligned with merchants over the prices of inputs like credit cards, electricity, or supplies. Keeping costs down keeps prices down. When car companies negotiate for high-volume tire discounts, they "drive[] down the price of tires, to the ultimate benefit of consumers." *Paddock Publ'ns v. Chicago Tribune Co.*, 103 F.3d 42, 45 (7th Cir. 1996). Similarly, "[e]ager to control the costs associated with running their businesses, merchants routinely seek lower prices for" their inputs. Pet. App. 216a. In this way, direct purchasers often vindicate the interests of downstream consumers. *Cf. Ill. Brick Co. v. Illinois*, 431 U.S. 720, 745-46 (1977).

At day's end, there is an irony in Amex's reliance on *Leegin* and *GTE Sylvania*. Those cases criticized earlier ones for depending "on 'formalistic' legal doctrine rather than 'demonstrable economic effect.'" *Leegin*, 551 U.S. at 888 (citation omitted). Yet Amex asks this Court to favor a legalistic contention (that its restraints are vertical in nature) over real-world effects (that its restraints crush horizontal competition). Instead, the anti-steering provisions' proven horizontal effects should lead "to more careful scrutiny" than would govern restraints limiting only intrabrand competition. *Id.* at 897.

II. AMEX OVERLOOKS THE DIFFERENT WAYS TO PROVE "MARKET POWER"

Amex argues (at 30-41) that the rule of reason requires plaintiffs to show "market power," and that the Government abandoned any market-power claim. While the rule of reason generally requires proof of

"market power," Amex conflates the indirect method of proving power with market power itself.

A. *Market Power.* As Amex notes (at 30-36), market power is a "significant consideration" under the rule of reason. *Leegin*, 551 U.S. at 886. *NCAA* defined market power as the ability "to alter the interaction of supply and demand in the market" and to "raise prices above those that would be charged in a competitive market." 468 U.S. at 109 & n.38. The Court has also called it the ability "to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13-14 (1984). And commentators have referred to it as "the ability to raise price significantly without losing so many sales that the increase is unprofitable." Frank Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135, 159 (1984).

A firm that lacks market power cannot inflict lasting harm through inefficient restraints. That is because "it cannot affect the price of its product; that price is determined by the market." Posner, *supra*, 48 U. Chi. L. Rev. at 16. If it uses an inefficient restraint that raises its prices, it will lose share as rivals undercut its prices and consumers turn to cheaper brands. *Leegin*, 551 U.S. at 897-98. Without the ability to affect industry prices, the restraint will be "harmless" to consumers, *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 797 (1st Cir. 1988), and "suicidal" to producers, *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 217 (D.C. Cir. 1986).

Generally, therefore, "[t]he process of rivalry is sufficient insurance" to prevent firms lacking market power from adopting inefficient restraints. Easterbrook, *supra*, at 159. Given the administrative concerns that the States identified (at 24-26), a market-power requirement can "filter" out lawsuits challenging restraints that cannot harm consumers. Easterbrook, *supra*, at 159-60. Indeed, in the tying context, the Court has already held that a firm must have market power over the "tying" product for it to be *per se* illegal to require consumers to buy a "tied" product. *Jefferson Parish*, 466 U.S. at 13-14.

That said, "market power" falls along a spectrum. On one end, most firms have some power over price because most goods are not completely homogenous. Richard Posner, *Antitrust Law* 195 (2d ed. 2001). On the other, monopolists have "a high degree" of power. William Landes & Richard Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 937 (1981). The key question is whether a firm has "enough market power to make a difference." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 794 (1999) (Breyer, J., concurring in part and dissenting in part).

B. *Proving Power.* Amex asserts (at 36) that the Government abandoned its market-power claim. Not so. This Court "has made it clear that there are two ways of proving market power"—an indirect way and a direct one. *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000) (citing *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986)); *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1071 (10th Cir. 2013) (Gorsuch, J.). The States' opening brief (at 28, 34-40) relied on the direct way to prove market power by showing *actual* anticompetitive effects.

Under the indirect method, the Government may show that the defendant has market power and that the restraint will limit competition. *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 97 (2d Cir. 1998). Courts using this method estimate a defendant's power by considering its share of a properly defined market. *Toys "R" Us*, 221 F.3d at 937. But these "inquiries into market definition and market power" show only a restraint's *potential* effects if evidence of its *actual* effects is absent. *Ind. Fed'n*, 476 U.S. at 460. That evidence is often unavailable because of "the difficulty of isolating the market effects of challenged conduct," *Brown Univ.*, 5 F.3d at 668, or because a restraint has yet to be adopted (as with a merger), Tr. 3825 (Katz). If, however, "there are better ways to estimate market power, the court should use them." *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins. Co., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986).

Under the direct method, "'proof of actual detrimental effects, such as a reduction of output, can obviate'" the need for the indirect inquiry. *Ind. Fed'n*, 476 U.S. at 460-61 (citation omitted). Actual effects are arguably better "evidence of market power than calculations of elusive market share figures." *Todd v. Exxon Corp.*, 275 F.3d 191, 206 (2d Cir. 2001) (Sotomayor, J.). The indirect method estimates whether a party *might* affect industry prices; the direct method shows that the party *has* done so. Pet. App. 109a.

Here, the States' opening brief (at 34-40) followed the direct method because Amex's provisions raised industry prices and reduced competition. These findings—by definition—prove its market power. A firm *without power* could not "alter the interaction of supply and demand in the market" by raising the credit-

card industry's merchant fees to channel competition to cardholders. *NCAA*, 468 U.S. at 109. If Discover attempted to do so, merchants would simply drop it. Pet. App. 190a-91a. That is why it is a "price taker" that generally sets its prices at or below its rivals'. Tr. 856-57 (Hochschild/Discover). Amex, by contrast, was able to strengthen its restraints to eliminate Visa's and Discover's price competition in the 1990s. Pet. App. 199a-205a. And it was able to repeatedly raise merchant fees in the 2000s without losing many merchants. Pet. App. 166a-67a, 208a.

Although the States relied on the direct method, Amex needlessly spends pages (at 36-41) on the "elusive" indirect one. *Todd*, 275 F.3d at 206. Nevertheless, two points deserve brief mention about that method. One: Amex suggests (at 37 & n.3) that no case has found that its 26% share can prove power. But Amex agrees (at 12 n.1) with *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), which held that MasterCard had market power. *Id.* at 239-40; *Amicus* Br. of Am. Express Co. at *16, *Visa*, 344 F.3d 229, 2002 WL 32828497. Amex "is larger today than MasterCard was" then. Pet. App. 152a.

Two: Amex argues (at 38-39) that it cannot have market power from "cardholder insistence" because it must invest some of its fees in rewards to create that insistence. It incorrectly asserts that this insistence arises from cardholders valuing rewards at their costs. If true, Amex would not need its restraints. The anti-steering provisions instead ensure that insistence partially arises from cross-subsidies. Pet. App. 212a. Regardless, even if insistence did arise from Amex's "superior value," this Court has recognized that the most extreme form of market power—

monopoly power—can arise from "'a superior product.'" *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 448 (2009) (citation omitted). And even monopolists will invest a portion of their higher prices into staying monopolists. Posner, *Antitrust Law*, *supra*, at 13-14; *United States v. Microsoft*, 253 F.3d 34, 57 (D.C. Cir. 2001) (en banc). Because monopoly power (or market power) can result from benign reasons, such power is not itself illegal. Instead, only *anticompetitive restraints* imposed by those with market power raise concerns under Section 1.

III. Contrary To Amex's Claim, The Effects Of Its Restraints Prove Its Power

Amex asserts (at 41-57) that the Government failed to prove actual anticompetitive effects. Its arguments fall short.

A. Amex Wrongly Claims That The Government Must Prove That Its Restraints Caused Higher Prices *And* Lower Output

Amex argues (at 42-43) that even if its anti-steering provisions raise merchant fees, the Government needed to demonstrate that they also decrease output. It is factually and legally mistaken.

Factually, Amex implies (at 42) that year-to-year increases in credit-card charge volume (as measured in dollars) show that its restraints raise output. Pet. App. 52a (citing 2d Cir. App. A2428 (Nilson Report)). That is mistaken. This statistic does not control for variables—like economic growth, population growth, or inflation—that would increase annual charge volume even in a monopolized market. *Cf.* 11 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law*,

¶ 1901, at 230 n.15 (3d ed. 2011). Proving that economic conditions (not Amex's restraints) drive charge volume, an Amex official admitted that Amex's business generally "grows roughly" at the same rate as the "discretionary GDP." Tr. 3544 (Silverman/Amex). And charge volume declined during the great recession. Tr. 4266-67 (Katz). Amex identifies nothing that shows the anti-steering provisions' *causal effects* on charge volume.

Legally, higher prices and lower output are flipsides of the same coin. "'[R]aising price, reducing output, and dividing markets have the same anticompetitive effects.'" *Cal. Dental Ass'n*, 526 U.S. at 777 (citation omitted). In markets with downward-sloping demand curves, restraints that raise prices will reduce output (or vice versa). 11 Areeda & Hovenkamp, *supra*, ¶ 1901, at 229. Thus, courts have repeatedly recognized that plaintiffs may prove that a restraint has caused "increases in price, *or* decreases in output or quality." *Visa*, 344 F.3d at 238 (emphasis added); *Procaps S.A. v. Patheon, Inc.*, 845 F.3d 1072, 1084-85 (11th Cir. 2016); *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 432-33 (4th Cir. 2015); *Brown Univ.*, 5 F.3d at 668-69.

This makes sense. Amex's argument that the Government must show that its restraints caused *not just* price hikes *but also* output contractions is merely another way of phrasing the Second Circuit's directive to prove that the price increases were not "offset" by cardholder rewards—a quality (and so) output metric. Pet. App. 51a; 7 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1503b, at 394 (3d ed. 2010). As the States noted (at 41-50), legal precedent and economic principle both suggest that

the higher prices generated by interbrand price restraints will decrease output *more* than any quality changes will increase it. When addressing horizontal restraints, for example, this Court has not required plaintiffs to balance the (decreasing) output effects from higher prices with any (increasing) output effects from higher quality. The price effects sufficed. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 694-95 (1978). Economic theory supports that rule. Even if interbrand price restraints shift competition to nonprice factors like quality, the higher quality will not offset the higher price (and output will decline). Posner, *Antitrust Law*, *supra*, at 14.

As the States also noted (at 50-52), administrative concerns suggest that output reductions should not be "'the *only* measure of anticompetitive effect'" due to the difficulty of measuring output. *O'Bannon v. NCAA*, 802 F.3d 1049, 1070 (9th Cir. 2015) (citation omitted). Output is not an "unambiguous" concept; "[s]ometimes identifying the relevant output is difficult." 7 Areeda & Hovenkamp, *supra*, ¶ 1503b, at 394. In *NCAA*, the television plan resulted in an immediate output reduction measured in terms of televised games, but the dissent thought the proper measure should be total viewership. *Compare* 468 U.S. at 105 & n.29, *with id.* at 129 (White, J., dissenting). Here, too, higher merchant fees result in an immediate output reduction measured in terms of the number of merchants that accept credit cards. Tr. 3946-48 (Katz); Pet. App. 186a-87a. Further, broader measures of the anti-steering provisions' effects on charge volume enmesh the judiciary in "evidentiary complexities." *Ill. Brick*, 431 U.S. at 731-32. Courts would need to balance the restraints' clear

output-reducing effects (higher merchant fees and retail prices) against any claimed output-increasing effects (cardholder benefits that would allegedly go unprovided). Because of the concrete consumer harms (in the form of higher merchant fees), Amex at least should bear the burden for the alleged output-increasing effects. *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983).

Amex's reliance on charge volume also overlooks the disconnect between those who make consumption decisions (cardholders) and those who pay for them (merchants). Given that disconnect, Amex's provisions make charge-volume output unresponsive to price. Pet. App. 195a-96a. They "distort competitive markets by steering consumers toward using more costly and less efficient payment methods." Frankel & Shampine, *supra*, at 672. Amex asks the Court to ignore this inefficiency, suggesting (at 51, 55) that it is a concern for regulators rather than courts. But antitrust law seeks to protect the competition that promotes allocative efficiency. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). By restricting interbrand price competition, Amex's restraints cause a misallocation of resources.

All of this said, a mere showing that prices have increased over time does not *automatically* prove anticompetitive harm. Services generated by resale price maintenance, for example, often lead to a higher price for *one* manufacturer's brand, but they leave other lower-priced brands available. *Leegin*, 551 U.S. at 895-97. Here, however, Amex's provisions have not just led *Amex* to charge higher prices (to pay for its rewards); they have led *all four* credit-card networks to do so. Pet. App. 207a. And even a

showing that market-wide prices have increased may not suffice. Price increases may result from other factors, such as shifting consumer demand. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 232 (1993). Here, however, Amex's restraints *caused* the higher prices. Pet. App. 207a. Where, as here, the Government shows that a restriction on competition causes prices to rise market-wide, it has met its initial burden.

B. Amex Wrongly Claims That The Higher Merchant Fees Did Not Suffice To Prove Anticompetitive Prices

Amex offers (at 43-50) three reasons why the higher merchant fees did not meet the Government's burden to establish anticompetitive harm: (1) they do not account for cardholder benefits; (2) they do not identify the "sub-prices" for components of the credit-card platform; and (3) they do not prove supracompetitive margins. Each claim lacks merit.

1. *Cardholder Benefits.* Amex suggests (at 43-46) that the Government needed to show a higher "net" price—that higher merchant fees were not offset by higher cardholder benefits. It is wrong for the same reasons that its output argument fails, *supra* Part III.A, and for the precedential, economic, and administrative reasons articulated in the States' opening brief (at 41-52).

In addition, Amex all but concedes (at 44-45) that it departs from the usual test for defining the "relevant market," recognizing that merchant services are not "reasonably interchangeable" with cardholder services. It lumps these complements into one market because they are both necessary for a credit-card

transaction. That is analogous to saying that tires and brakes must be treated as part of the same market because they are both necessary inputs for cars. Under Amex's logic, "there [could] never be separate markets, for example, for cameras and film, computers and software, or automobiles and tires." *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 463 (1992). While elsewhere agreeing (at 57) that clear antitrust rules are important, Amex's argument here muddies the bright-line market-definition test.

Regardless, Amex wrongly suggests (at 44) that the district court "had no evidence" about the net price. As the States explained (at 57-58), the district court found that Amex's restraints caused higher "net" prices. To be sure, the court noted that it could not quantify two-sided prices. Pet. App. 209a. But it found sufficient evidence to conclude that Amex did *not* shift all of the revenue from its "Value Recapture" price increases to cardholder benefits. *Id.* Instead, merchant-fee increases qualified "as changes to the net price charged across Amex's integrated platform." *Id.* at 166a-67a, 209a-10a.

2. *Separate Sub-Prices.* Amex argues (at 46-48) that the Government needed to divide the higher merchant fees into their three component parts, and show higher "sub-prices" for services provided at the issuer level, network level, and acquirer level. Amex offers neither precedent nor theory explaining why this break-down is required or relevant. Indeed, courts have rejected narrower defenses that a restriction on "one component of an overall price" did not affect that overall price. *O'Bannon*, 802 F.3d at 1070; *Catalano*, 446 U.S. at 649. Here, Amex has affected the *overall* merchant price. Amex also oper-

ates an integrated network, so the way in which it allocates merchant fees to its services represents a mere bookkeeping exercise. Pet. App. 83a-84a.

3. *Supracompetitive Margins.* Amex claims (at 48-50) that the Government bears the burden to prove supracompetitive margins. This is theoretically unsound and conflicts with precedent.

"[T]here is not even a good economic theory that associates monopoly power with a high rate of return." *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1412 (7th Cir. 1995) (Posner, J.). Monopolists invest resources to obtain monopoly profits; cartel members invest resources to obtain greater shares of cartel profits. 2B Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 502, at 113 (4th ed. 2014). These efforts increase costs and reduce margins. Posner, *Antitrust Law*, *supra*, at 13-14. Thus, Amex's test would not even invalidate restraints deemed so anticompetitive as to be unlawful *per se*. And while Amex protests (at 51) that courts should not act as central planners, this test converts antitrust law from a scheme to protect competition into one "resembling public utility price regulation"—under which courts examine a defendant's balance sheets, make it justify its costs, and decide if its return is "fair." *See In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 874 (7th Cir. 2015).

Unsurprisingly, Amex cannot ground its test in precedent. It relies (at 48) on *Brooke Group*, which recognized that higher prices *alone* do not prove anticompetitive conduct because they can result from market factors. 509 U.S. at 232. That is why the Court said: "Only if those higher prices are a product

of *nonmarket forces* has competition suffered." *Id.* (emphasis added). Plaintiffs must prove that a restraint—not market factors—*caused* higher prices. Here, the district court held that the Government met this causation element because the higher prices *were* a product of Amex's restraints. Pet. App. 207a.

If anything, this Court has repeatedly condemned restraints that interfere with price—the "'central nervous system of the economy.'" *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692 (citation omitted). It has invalidated restraints when they "disrupt[ed] the proper functioning of the price-setting mechanism of the market," *Ind. Fed'n*, 476 U.S. at 461-62, or created structures "unrelated to the prices that would prevail in a competitive market," *NCAA*, 468 U.S. at 106. This is for good reason. When restraints prevent prices from fluidly adjusting, a firm's costs become "price-determined, not price-determining." George Douglas & James Miller, *Quality Competition, Industry Equilibrium, and Efficiency in the Price-Constrained Airline Market*, 64 Am. Econ. Rev. 657, 668 (1974). But interbrand competition should decide the proper mix of high-reward, high-priced cards and low-reward, low-priced ones. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695. During the days of price-regulated airlines, consumer welfare was harmed by controls setting high prices even if airline margins were eaten up by lavish services. States' Br. 48.

C. Amex Wrongly Claims That The Government Relies Only On A "Quick Look"

Amex argues (at 51-53) that the Government relies on the quick-look doctrine. That is mistaken.

The quick-look doctrine allows the Government to rely on economic principles *alone* without real-world evidence confirming economic theory. It applies if "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n*, 526 U.S. at 770. When, for example, the NCAA restricted the number of football games aired on television, this Court held that it bore the burden to produce a pro-competitive justification for this horizontal restraint "even in the absence of a detailed market analysis." *NCAA*, 468 U.S. at 110. And when dentists agreed not to provide x-rays to insurers, the Court made a similar point. *Ind. Fed'n*, 476 U.S. at 460.

If the States sought to invoke this quick-look doctrine here, they could have relied *exclusively* on the "theoretical claim" that Amex's provisions will limit horizontal competition and raise merchant fees. *Cal. Dental Ass'n*, 526 U.S. at 775 n.12. But the Government did far more. It presented the "detailed market analysis" that this Court called unnecessary in the quick-look context. *NCAA*, 468 U.S. at 110. A lengthy trial with dozens of witnesses proved that Amex's provisions "made a real difference in the marketplace." *Cal. Dental Ass'n*, 526 U.S. at 788 (Breyer, J., concurring in part and dissenting in part). They frustrated price competition "to the point of near irrelevance," Pet. App. 195a, "result[ing] in higher all-in merchant prices," *id.* at 207a.

If Amex suggests that *NCAA* or *Indiana Federation of Dentists* articulate principles *only* for quick-look cases, it is mistaken. As Amex elsewhere admits (at 34), these cases alternatively engaged in a

fuller market analysis. In *NCAA*, the Court rejected the NCAA's argument both because the NCAA needed to show a procompetitive justification even if it lacked market power *and* because it had that power. 468 U.S. at 109-13. *Indiana Federation of Dentists* did the same. 476 U.S. at 460-61. Circuit courts thus routinely cite these cases for general rule-of-reason principles. *E.g.*, *Todd*, 275 F.3d at 207.

Amex also claims (at 53) that the States seek to transform Amex's vertical restraints into horizontal ones based on their horizontal effects. The States do no such thing. The rule of *per se* illegality would govern a horizontal agreement between Amex and its competitors barring merchants from steering customers. *Catalano*, 446 U.S. at 649. Here, the rule of reason applies to vertical agreements between Amex and its merchants. The anti-steering provisions' horizontal effects do, however, prove their anticompetitive nature (and Amex's market power) under that case-by-case rule. *Cf. Leegin*, 551 U.S. at 897-99.

IV. AMEX (AND ITS *AMICI*) MISTAKENLY CLAIM THAT A HOLDING FOR THE GOVERNMENT WILL RISK "FALSE POSITIVES" IN FUTURE CASES

Amex and its *amici* lastly raise broader concerns with a ruling for the Government, albeit from different perspectives. They are mistaken.

Amex suggests (at 53-54) that the Government offers no "administrable standard" for rule-of-reason cases, and endangers other vertical restraints. Yet the Government offers a clear, demanding rule: It met its initial burden—and shifted to Amex the burden to show procompetitive rationales—when it proved that Amex's restraints have raised merchant

prices by decreasing interbrand price competition. For decades, such stark effects—which show Amex's market power—have proved a *prima facie* case. *See Ind. Fed'n*, 476 U.S. at 460-61. And, contrary to Amex's claim (at 53-54), this rule does not call into doubt exclusive-dealing or output contracts. Those distinct restraints, which are also governed by the rule of reason, would require a similarly demanding showing of market-wide effects. *Jefferson Parish*, 466 U.S. at 45 (O'Connor, J., concurring in judgment); *Interface Grp., Inc. v. Mass. Port Auth.*, 816 F.2d 9, 11 (1st Cir. 1987). This argument also ends Amex's brief the way it begins—discussing unrelated restraints that distance Amex even further from the Second Circuit's sole reliance on the credit-card platform's alleged uniqueness.

Meanwhile, Amex's *amici* raise concerns with any decision treating one side of a two-sided platform as the "relevant market" for antitrust purposes. *E.g.*, *Amicus* Br. of David Evans & Richard Schmalensee, at 8-28; *Amicus* Br. of Gregory Sidak & Robert Willig, at 6-21. As the States noted (at 41-42), this Court need not opine on the proper market scope for two-sided platforms. Even if both sides qualify as one market, a restraint with the purpose and effect of eliminating interbrand competition over one product characteristic generally requires some procompetitive justification even if interbrand competition still occurs over other product characteristics. *See Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695. That critical insight shows that the Government met its initial burden in this case, which shifted the burden to Amex to offer procompetitive rationales.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor
HANNAH C. WILSON
Deputy Solicitor
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@
ohioattorneygeneral.gov

Counsel for Petitioner
State of Ohio

FEBRUARY 2018

ADDITIONAL COUNSEL

GEORGE JEPSEN
Attorney General
State of Connecticut

LAWRENCE G. WASDEN
Attorney General
State of Idaho

LISA MADIGAN
Attorney General
State of Illinois

TOM MILLER
Attorney General
State of Iowa

BRIAN E. FROSH
Attorney General
State of Maryland

BILL SCHUETTE
Attorney General
State of Michigan

TIM FOX
Attorney General
State of Montana

DOUGLAS J. PETERSON
Attorney General
State of Nebraska

PETER KILMARTIN
Attorney General
State of Rhode Island

HERBERT H. SLATERY III
Attorney General
State of Tennessee

KEN PAXTON
Attorney General
State of Texas

SEAN D. REYES
Attorney General
State of Utah

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont

No. 16-1454

In the Supreme Court of the United States

STATE OF OHIO, ET AL., PETITIONERS

v.

AMERICAN EXPRESS COMPANY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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REPLY BRIEF FOR THE UNITED STATES

Amex does not deny that its anti-steering rules have effectively eliminated competition among credit-card networks on the fees charged to merchants. It could not reasonably do so. In the 1990s, Amex strengthened the rules to "stifle" successful price competition from Visa and MasterCard, Pet. App. 200a, and the district court found based on overwhelming evidence that the rules have worked as intended. Credit-card networks no longer compete on merchant fees, and the rules prevent Discover or a new entrant from gaining market share by offering merchants a low-cost alternative. Eliminating price competition and blocking rivals in this $50 billion market are paradigmatic anticompetitive harms.

Amex principally argues that even if a vertical restraint is proved to have such anticompetitive effects, it cannot be deemed prima facie unreasonable unless the plaintiff separately shows that the defendant has mar-

ket power. That argument rests on a fundamental error. Market power is simply a proxy for the ability to harm competition. It can be established indirectly, through an analysis of market share, barriers to entry, and other market conditions. But it can also be established directly, with proof that the defendant *actually has* harmed competition. Further inquiry into a defendant's theoretical ability to harm competition is unnecessary where, as here, a plaintiff proves that the defendant has actually caused such harm.

Amex also asserts that because the anti-steering rules are vertical restraints, their distortion of the competitive process does not qualify as a cognizable anticompetitive harm. Vertical restraints will rarely block interbrand price competition across an entire market. But where, as here, such a distortion is proved, the vertical nature of the restraint does not excuse or diminish it. And even if more proof of anticompetitive harm were required, the district court also found that the anti-steering rules have allowed all four networks to raise prices above competitive levels.

Amex repeatedly invokes the premise that the anti-steering rules serve legitimate ends. But the district court found that those ostensible procompetitive justifications are not "supported by the record," Pet. App. 230a—a holding that Amex did not appeal. And while Amex accuses the United States and the States of elevating merchants' interests over those of consumers, the anti-steering rules have led to higher retail prices and reduced consumer choice. In any event, Amex's asserted procompetitive justifications are relevant only at the second step of the rule-of-reason inquiry, where the burden lies with Amex. They have no bearing on wheth-

er the district court's undisturbed factual findings establish a prima facie case that the anti-steering rules unreasonably restrain trade.

A. Amex's Market-Power Argument Lacks Merit

The court of appeals applied the established rule-of-reason framework, which allows a plaintiff to carry its initial burden in either of two ways: directly, by showing that the challenged restraint has actual anticompetitive effects; or indirectly, by showing that the defendant has market power and that the restraint would tend to harm competition. Pet. App. 27a-28a; see Antitrust Law Professors' Amicus Br. 5-10. Amex asserts (Br. 24-41) that the direct method of proof is inapplicable to vertical restraints. That argument is contrary to this Court's precedents and to common sense. And even if separate proof of Amex's market power were required, the district court correctly found it present here.

1. Separate evidence of market power is unnecessary when a plaintiff proves actual adverse effects on competition

Amex correctly observes (Br. 30) that a vertical restraint imposed by a defendant that lacks market power cannot unreasonably restrain trade. Market power is the power "to force a purchaser to do something that he would not do in a competitive market," *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 464 (1992) (*Kodak*) (citation omitted), including "the ability to raise prices above those that would be charged in a competitive market," *NCAA* v. *Board of Regents*, 468 U.S. 85, 109 n.38 (1984). By definition, a defendant that lacks such power cannot raise prices, reduce output, exclude competitors, or otherwise harm competition in the market as a whole unless it engages in horizontal collusion.

Although Amex's premise is sound, it does not support a rule requiring indirect evidence of market power. Even absent evidence of market share, "[i]t is clearly reasonable to infer that [a defendant] has market power to raise prices and drive out competition" where, as here, plaintiffs "offer direct evidence that [the defendant] did so." *Kodak*, 504 U.S. at 477; see Antitrust Law Professors' Amicus Br. 6. "[T]he purpose of the inquir[y] into * * * market power is to determine whether an arrangement has the potential for genuine adverse effects on competition." *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 460 (1986) (*Indiana Dentists*). It logically follows that "'proof of actual detrimental effects' * * * can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *Id.* at 460-461 (citation omitted).

Although *Indiana Dentists* involved a horizontal agreement (Amex Br. 33), this Court's logic applies equally here. Whether the challenged restraint is horizontal or vertical, market power is a "'surrogate'" that serves to identify "the potential for genuine adverse effects on competition." *Indiana Dentists*, 476 U.S. at 460-461 (citation omitted). Thus, whether the restraint is horizontal or vertical, proof of *actual* adverse effects on competition "obviate[s] the need for an inquiry into market power." *Id.* at 461.

Amex cites (Br. 32-33 & n.2) circuit-court decisions stating that vertical restraints adopted by defendants without market power cannot unreasonably restrain trade. But none of those decisions prohibits the use of actual detrimental effects to establish market power. And numerous decisions—including decisions by the same courts—confirm that market power may be shown through "direct proof" of anticompetitive effects. *E.g.*,

United States v. *Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir.), cert. denied, 534 U.S. 952 (2001).[1] Indeed, the Seventh Circuit has rejected as "backwards" the assertion "that anticompetitive effects in a market cannot be shown unless the plaintiff * * * first proves that [the defendant] has a large market share." *Toys "R" Us, Inc.* v. *FTC*, 221 F.3d 928, 937 (2000) (Wood, J.).

2. The district court correctly held that separate evidence showed Amex's market power

Amex contends (Br. 36-41) that the United States and the States failed to offer sufficient separate evidence of its market power. This Court need not address that question in light of the ample proof that the anti-steering rules adversely affect competition. See Part B, *infra*. In any event, Amex's argument is mistaken.

a. The district court correctly found (Pet. App. 148a-191a) that Amex has "the power 'to force [merchants] to do something that [they] would not do in a competitive market,'" *Kodak*, 504 U.S. at 464 (citation omitted), and "to raise prices," *NCAA*, 468 U.S. 85 at 109 n.38. Amex has that power because, "[f]or all but some of the smallest merchants, accepting Amex cards is a requirement of doing business." Wal-Mart Amicus Br. 4.

Many Amex cardholders are "insistent" on using their Amex cards and will take their business elsewhere if a merchant stops accepting Amex. Pet. App. 156a-157a. That insistence "effectively prevents merchants

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[1] See, *e.g.*, *Conwood Co.* v. *United States Tobacco Co.*, 290 F.3d 768, 783 n.2 (6th Cir. 2002), cert. denied, 537 U.S. 1148 (2003); *Todd* v. *Exxon Corp.*, 275 F.3d 191, 206 (2d Cir. 2001) (Sotomayor, J.); *United States* v. *Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993); *Flegel* v. *Christian Hosp.*, 4 F.3d 682, 688 (8th Cir. 1993).

from dropping American Express"—as numerous merchants confirmed at trial. *Id.* at 158a; see *id.* at 158a-159a & nn. 26-27. For example, Walgreens tried to stop accepting Amex cards because of Amex's higher fees, but "was forced to retreat" after an "outcry from its customers." *Id.* at 163a. Walgreens' President testified that, although Walgreens is the Nation's ninth-largest retailer, it quickly discovered that "Amex was the 800-pound gorilla" in their negotiations. Tr. 1391-1392.

The district court also found that Amex's power over merchants has allowed it to raise its fees substantially without losing business. Between 2005 and 2010, Amex's Value Recapture initiative "repeatedly and profitably" raised prices that were "already at or above the competitive level," and did so "without losing a single large merchant and losing relatively few small merchants." Pet. App. 165a, 167a; see U.S. Br. 30-31.

b. Amex provides no sound reason to question the district court's conclusion that its leverage over merchants constitutes market power.

Amex asserts (Br. 36) that it "cannot reduce market-wide output" by "curtail[ing] supply." But even if that were true, market power can also be proved through evidence that the defendant can "raise prices" free from competitive pressure. *NCAA*, 468 U.S. at 109 n.38. Amex does not need to curtail supply (whatever that would mean in this context) to raise prices above competitive levels. Instead, it can simply raise its fees. In a competitive market, merchants would respond by shifting volume to lower-priced competitors. Here, however, the combination of Amex's insistent cardholders and the anti-steering rules makes that impossible. Cardholder insistence means that merchants must con-

tinue to accept Amex, and the anti-steering rules prohibit Amex-accepting merchants from shifting transactions to lower-fee networks.

Amex argues (Br. 36-37) that its 26.4% market share implies a lack of market power. But Amex has the second-largest share of a "highly concentrated" market with just four participants. Pet. App. 153a; see *id.* at 151a. That market is "constrained by high barriers to entry" and has been "remarkably static," with no new entrants in 30 years. *Id.* at 153a-154a. Although a 26.4% market share without more would not support an inference of market power, it does not preclude a finding to that effect where, as here, such a finding is supported by other evidence.[2]

Amex contends (Br. 38-39) that cardholder insistence cannot contribute to market power because it is based on Amex's continuing investments in cardholder rewards. But *every* firm with market power would quickly lose that power if it stopped providing the features that make its products attractive to customers. Cf. *Microsoft*, 253 F.3d at 57 ("even monopolists have reason to invest in R&D"). The question thus is not whether a firm must continue to invest to maintain its market power; it is whether that market power is "durable" in the sense that it can be expected to persist "for a significant period without erosion by new entry or expansion." 2B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 501, at 111 (4th ed. 2014)

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[2] At Amex's urging, the Second Circuit previously held that MasterCard had market power when it had a 26% market share. *United States* v. *Visa U.S.A., Inc.*, 344 F.3d 229, 239-240 (2003) (Leval, J.), cert. denied, 543 U.S. 811 (2004); see Amex Amicus Br. at 16, *Visa U.S.A.*, *supra* (No. 02-6074).

(Areeda & Hovenkamp). The district court correctly found that Amex's market power is durable because it has persisted for decades and because it is protected by stable market conditions including "sustained high barriers to entry." Pet. App. 165a.

B. The Facts Found By The District Court Establish That The Anti-Steering Rules Adversely Affect Competition

Amex emphasizes (Br. 24-26) that the anti-steering rules are vertical restraints that must be judged under the rule of reason. The United States and the States have never argued otherwise, and the district court conducted an exhaustive rule-of-reason inquiry. Pet. App. 105a-106a & n.7; see *id.* at 111a-258a. That inquiry showed that the rules impose "actual, sustained adverse effects on competition," *Indiana Dentists*, 476 U.S. at 461, by stifling price competition, blocking rivals, raising merchant fees, and ultimately inflating the retail prices paid by all Americans. U.S. Br. 23-34.

1. Amex does not deny that the anti-steering rules stifle price competition, block rivals, and stunt innovation

a. The anti-steering rules prevent merchants from altering their consumption of a network's services in response to changes in the network's price. Pet. App. 196a. The rules bind merchants that account for 90% of total market volume, and they apply to *all* of the merchants' transactions—even those that do not involve Amex cards. *Id.* at 101a-102a; see U.S. Br. 4. The district court found that the rules have "frustrated" competition on merchant fees "to the point of near irrelevance," Pet. App. 195a, reflecting "a decision made by [Amex] on behalf of all participants in the network services market that networks will not compete * * * by lowering their merchant pricing," *id.* at 240a.

The district court further found that the anti-steering rules make it "nearly impossible" for a new firm to enter the market "by offering merchants a low-cost alternative to the existing networks" or an innovative alternative payment system. Pet. App. 203a; see U.S. Br. 32-34. That harm is not "[t]heoretical" (Amex Br. 51). Discover pursued a low-fee strategy in the 1990s but was thwarted by anti-steering rules. Pet. App. 203a-206a. And by blocking Discover and other potential entrants from pursuing a low-fee strategy, the anti-steering rules reduce competition and artificially constrain the range of options available to merchants and cardholders alike. Connor Amicus Br. 16-21.

b. Amex does not seriously dispute that the anti-steering rules stifle price competition and block low-fee rivals.[3] Instead, it asserts (Br. 51-53) that such harms to the competitive process cannot establish a prima facie case without proof of price or output effects. That is not so. Under the rule of reason, "the criterion to be used in judging the validity of a restraint on trade is its impact on competition." *NCAA*, 468 U.S. at 104. The plaintiff's burden is to "allege and prove harm * * * to the competitive process, *i.e.*, to competition itself." *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 135 (1998). A plaintiff can carry that burden by proving that a restraint has rendered price and output "unresponsive to

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[3] Amex asserts in a single sentence (Br. 56) that Discover's low-fee strategy failed for other reasons. But the district court found that "the failure of Discover's low-price value proposition is emblematic of the harm done to the competitive process by Amex's rules." Pet. App. 207a. The court also noted that Amex "d[id] not strenuously dispute the evidence regarding the effect of anti-steering rules on Discover's low-price model, or that such restrictions effectively raise a barrier to entry * * * for firms pursuing a low-price strategy." *Id.* at 205a-206a.

consumer preference," *NCAA*, 468 U.S. at 107, or otherwise "disrupt[ed] the proper functioning of the price-setting mechanism of the market," *Indiana Dentists*, 476 U.S. at 461-462.

Amex asserts (Br. 52) that *NCAA* and *Indiana Dentists* are irrelevant because they involved horizontal agreements and the Court therefore applied the "quick look" method rather than the full rule of reason. But whether a court applies the per se rule, the quick look, or the full rule of reason, "the essential inquiry remains the same—whether or not the challenged restraint enhances competition." *NCAA*, 468 U.S. at 104. Vertical restraints require more careful analysis because they are less likely to harm interbrand competition. *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 890 (2007). The Court has cautioned, however, that in applying the rule of reason, "the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated." *Id.* at 894. Where, as here, a full rule-of-reason analysis reveals that a vertical restraint has effectively eliminated price competition across an entire market, the vertical nature of the restraint does not diminish the anticompetitive harm or excuse the defendant from the burden of procompetitive justification.

c. Amex also objects (Br. 53-55) that there is no "administrable standard" for identifying harms to the "competitive process." But as Amex acknowledges (Br. 53-54), courts routinely identify such harms in assessing exclusive-dealing contracts. Courts considering challenges to such restraints do not require proof of price or output effects to establish a prima facie case. Instead, "the proper focus is on the structure of the market." *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*,

466 U.S. 2, 45 (1984) (O'Connor, J., concurring in the judgment). When sellers are "numerous and mobile, and the number of buyers is large, exclusive-dealing arrangements of narrow scope pose no threat" because they do not affect competition in the market as a whole. *Ibid.* But an arrangement may be unreasonable if "a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal." *Ibid.* Such a foreclosure requires some procompetitive justification because it is "an impairment of the competitive structure of the market." *Stop & Shop Supermarket Co.* v. *Blue Cross & Blue Shield*, 373 F.3d 57, 66 (1st Cir. 2004) (Boudin, C.J.) (*Stop & Shop*); see, *e.g.*, *Interface Grp., Inc.* v. *Massachusetts Port Auth.*, 816 F.2d 9, 11 (1st Cir. 1987) (Breyer, J.).

The anti-steering rules are not exclusive-dealing contracts, but their "impairment of the competitive structure of the market," *Stop & Shop*, 373 F.3d at 66, is even clearer. The rules do not prohibit merchants from accepting rival cards, but they have effectively prevented price competition by eliminating any meaningful economic incentive for other networks to lower their merchant fees. That stifling of interbrand price competition is the sort of harm usually associated with horizontal collusion, and it constitutes a serious injury "to the competitive process, *i.e.*, to competition itself." *NYNEX*, 525 U.S. at 135.

Contrary to Amex's assertion (Br. 53-54), deeming such a severe distortion of the competitive process sufficient to establish a prima facie case will not lead to condemnation of benign or procompetitive arrangements that benefit consumers. Vertical restraints that manufacturers impose on their own distributors generally do not restrain interbrand competition. *Leegin*,

551 U.S. at 889-894. Exclusive-dealing arrangements and similar restraints likewise pose no antitrust concern when, as is typical, they cover only a small portion of the market and thus do not affect competition in the market as a whole. See *Stop & Shop*, 373 F.3d at 68 ("For exclusive dealing, foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent."). The anti-steering rules, by contrast, effectively constrain the entire market because they bind merchants that account for more than 90% of credit-card transactions by dollar value. U.S. Br. 4. Only in unusual cases like this one will plaintiffs be able to prove that a vertical restraint has harmed interbrand competition across a market.

2. The anti-steering rules have allowed all four networks to raise their fees above competitive levels

Even if proof of harm to the competitive process were insufficient, the United States and the States also showed that the anti-steering rules have allowed all four networks to raise their merchant prices. U.S. Br. 30-32. Amex's challenges to the sufficiency of that proof reflect a persistent failure to acknowledge the district court's findings.

a. Amex asserts (Br. 28) that "the record contradicts the premise that the [anti-steering rules] cause merchants to pay higher fees." That statement ignores the finding that the rules "have allowed all four networks to raise their swipe fees more easily and more profitably," resulting in "higher all-in merchant prices across the network services market." Pet. App. 207a; see *id.* at 207a-212a. It also contradicts economic logic and a wealth of evidence from market participants—including Amex's own executives, who acknowledged

that without the anti-steering rules, Amex "would face increased pressure to reduce its rates." *Id.* at 218a.[4]

b. Amex also asserts (Br. 48) that the United States and the States could not rely on proof of higher prices without "evidence of costs or margins." But contrary to Amex's assumption (Br. 49), a plaintiff need not show that a defendant's margin exceeds some (unspecified) level to establish that its prices are "supracompetitive." Supracompetitive prices are prices "above those that would be charged in a competitive market." *NCAA*, 468 U.S. at 109 n.38. The relevant question is thus whether the challenged restraint has raised prices above those that would prevail under competitive conditions.

As Amex observes (Br. 49-50), proof that one firm charges higher prices than its rivals is insufficient to establish supracompetitive pricing, because the difference may reflect superior value. *Leegin*, 551 U.S. at 896-897. Even proof of "rising prices" across the market may simply reflect "growing product demand." *Brooke Grp. Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993); cf. Amex Br. 39-40. The critical question is whether the "higher prices are a

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[4] Amex observes (Br. 28) that "there was no evidence that merchant fees decreased for merchants that did not accept Amex cards" after Visa and MasterCard rescinded their anti-steering rules in response to this suit. But the "very small" merchants that do not accept Amex "have not yet begun widespread steering," Pet. App. 224a, and the district court found that large merchants bound by Amex's anti-steering rules *would* steer if they could, *id.* at 221a-222a. Amex can hardly argue otherwise, because the remainder of its brief rests on the premise that the rules are necessary to prevent steering (otherwise, they would have no effect at all).

product of nonmarket forces." *Brooke Grp.*, 509 U.S. at 232.[5]

Here, the district court found that networks' increasing merchant fees are attributable in significant part to "nonmarket forces," *Brooke Grp.*, 509 U.S. at 232—specifically, the competition-suppressing effect of the anti-steering rules. The court found that the rules "were integral to American Express's Value Recapture increases," Pet. App. 208a-209a, which substantially raised fees that "were already at or above the competitive level," *id.* at 167a. The court also found that the rules have "enabled American Express's competitors to charge higher all-in fees." *Id.* at 210a. Most strikingly, anti-steering rules allowed Discover "to radically increase its merchant pricing" with "virtual impunity" after it was forced to abandon its low-fee strategy. *Ibid.*

The networks' increased fees cannot plausibly be attributed to rising demand, increasing costs, or other market forces. A Discover executive stated that Discover had radically increased its fees simply because it had been "leaving money on the table." Pet. App. 206a (citation omitted). And Amex executives acknowledged that Amex's Value Recapture price increases were not based on its "cost structure." Tr. 2832. Instead, Amex's pricing strategy starts "with a baseline rate equal to the Visa/MasterCard * * * rate," and then adds a measure of "value" based on the sales a merchant would lose if it stopped accepting Amex. Pet. App. 160a. Using that

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[5] See, *e.g.*, *Gordon* v. *Lewistown Hosp.*, 423 F.3d 184, 210 (3d Cir. 2005) (a plaintiff may carry its burden by showing that the restraint "raised prices"), cert. denied, 547 U.S. 1092 (2006); *Thurman Indus., Inc.* v. *Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1373 (9th Cir. 1989) (a plaintiff may carry its burden by showing "price increases caused by the restraint").

method, Amex "targeted" merchants "with relatively high rates of cardholder insistence" for "multiple rounds of price hikes," and the Value Recapture rate increases ultimately yielded "$1.3 billion in incremental pre-tax income." *Id.* at 167a, 170a.

c. Amex also asserts that the district court focused on "the wrong price." Br. 48 (emphasis omitted). The court addressed the merchant discount rate, which is the price merchants pay to Amex and to acquirers affiliated with Visa, MasterCard, and Discover. Amex asserts (Br. 47) that the court should have focused instead on the "network fee," which is the component of the merchant discount rate kept by the network in the disaggregated systems operated by Visa and MasterCard. See Pet. App. 81a-84a. But the district court correctly focused on the price that merchants actually pay—and the price on which the networks would compete if steering were allowed. The fact that Visa and MasterCard ultimately distribute merchant payments among the network, the acquirer, and the issuer is irrelevant.

d. Amex asserts (Br. 43-46) that the district court erred by relying on increases in merchant prices without considering "net" or "two-sided" prices accounting for cardholder rewards. As Amex acknowledges (Br. 43-44), that argument rests on the court of appeals' holding that the relevant market must be defined to include services to cardholders. That holding was incorrect. See Part C, *infra*. And for two reasons, Amex's argument about its two-sided price would be unpersuasive even under the court of appeals' market definition.

First, Amex is wrong to assert (Br. 44) that "the district court concededly had no evidence about [Amex's] net price." In fact, the court found that Amex's Value

Recapture price increases "were not paired with offsetting adjustments on the cardholder side of the platform" and thus constituted increases to Amex's "net price." Pet. App. 166a; see *id.* at 209a (finding "a higher net price"); U.S. Br. 47-49.

Second, even if the higher merchant fees made possible by Amex's anti-steering rules were wholly offset in the aggregate by increased cardholder rewards, the distortion of the market's price-setting mechanism would still be a matter of antitrust concern. U.S. Br. 40-43. That conclusion does not "focus[] on the welfare of merchants to the exclusion of [cardholders]" (Amex Br. 45). The anti-steering rules distort the market—and harm both merchants and cardholders—by precluding legitimate forms of competition on both sides of the platform. U.S. Br. 42.

The district court found that the higher merchant fees that result from the anti-steering rules are passed along to consumers through higher retail prices. See Pet. App. 210a-212a. Amex's argument that the rules benefit consumers depends on the premise that Amex's cardholder rewards are more valuable than the incentives that merchants might provide to use alternative payment methods. Consumer welfare is ordinarily enhanced, however, by the availability of a broader array of options that a competitive environment can produce. The Court in *Leegin* observed that, as a general matter, vertical price restraints "ha[ve] the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between." 551 U.S. at 890. But the purpose and effect of Amex's anti-steering rules is to *foreclose* the development of an analogous range of consumer choices among payment methods.

Thus, while Amex is free to pursue a strategy of pairing high merchant fees with high cardholder rewards, the anti-steering rules harm competition by effectively forcing the *entire market* to follow Amex's path.

3. Increased volume of credit-card transactions does not undermine the showing of anticompetitive effects

Amex emphasizes (Br. 1, 3, 22, 39-40, 42-43) that the dollar volume of credit-card transactions has been increasing. But "a 'reduction in output is not the *only* measure of anticompetitive effect.'" *O'Bannon* v. *NCAA*, 802 F.3d 1049, 1070 (9th Cir. 2015) (citation omitted), cert. denied, 137 S. Ct. 277 (2016). For two reasons, the growth in transaction volume does not undermine the conclusion that the anti-steering rules harm competition.

First, transaction volume is influenced by many factors, including general economic conditions. See Tr. 3544 (Amex's business "grows roughly at the [rate of] discretionary GDP growth"). The fact that volume has increased despite the anti-steering rules thus sheds no light on what it would be if the rules had not existed. Cf. Australian Retailers Ass'n Amicus Br. 15 (describing rapid growth in transaction volume following Australia's prohibition on anti-steering rules).

Second, a focus on output is unilluminating here precisely because of the distorting effect of the anti-steering rules. U.S. Br. 49 n.11. Ordinarily, supracompetitive prices and reduced output go hand-in-hand because consumers respond to higher prices with lower demand. See *Fortner Enters., Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 503 (1969). But the anti-steering rules "sever[] the typical link between merchants' demand for network services and the price charged for the same." Pet. App. 195a.

C. Amex's Services To Cardholders And Its Services To Merchants Belong In Separate Antitrust Markets

The court of appeals held that the relevant market in this case must be defined to include the services Amex provides to cardholders as well as the services it provides to merchants. Pet. App. 32a-33a. This Court need not resolve that issue because proof of "actual, sustained adverse effects on competition" eliminates the need for "specific findings * * * concerning the definition of the market." *Indiana Dentists*, 476 U.S. at 460-461. If the Court does reach the issue, it should reaffirm the rule that an antitrust market "consists only of goods that are reasonably close *substitutes* for one another." Areeda & Hovenkamp ¶ 565a, at 430.

Amex's own description confirms (Br. 5-6) that it provides very different bundles of services on "the cardholder side" and the "the merchant side" of its platform. Amex also acknowledges (Br. 44-45) that those services are not substitutes. And Amex sells those services separately, to different groups of consumers in very different competitive environments. Amex, Discover, and thousands of issuing banks compete vigorously to attract cardholders, but the four networks do not compete on merchant fees. Pet. App. 81a-84a, 119a.

Amex emphasizes (Br. 45) that each credit-card transaction involves services to both merchants and cardholders. But that does not mean that those two bundles of services belong in the same market. And in proposing a market defined in terms of "transactions," it is Amex that "presupposes a product that does not exist" (Amex Br. 44-45). Amex does not sell "transactions." It sells merchant and cardholder services to different customers, who pay for those services in differ-

ent ways. Collapsing those two nonsubstitutable services into a single market would only cloud the inquiry. U.S. Br. 35-40; Antitrust Law Professors' Amicus Br. 17-20.[6]

D. Amex's Asserted Justifications For The Anti-Steering Rules Are Irrelevant To The Question Presented And Are Foreclosed By The District Court's Factual Findings

Amex repeatedly asserts that the anti-steering rules serve legitimate procompetitive ends. But the district court considered and rejected those procompetitive justifications as factually unsupported—a holding that Amex did not appeal. And even if Amex's justifications were valid, they would be relevant only at the second step of the burden-shifting inquiry. They have no bearing on the question whether the United States and the States carried their initial burden to show that the rules are prima facie anticompetitive.

1. Amex asserts (Br. 26-29) that its relationship with merchants is akin to a manufacturer's relationship with its retailers, and that the anti-steering rules are like retail price maintenance and other restraints that manufacturers use to control the distribution of their products. That comparison is inapt.

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[6] As Amex observes (Br. 45 n.4), this Court has sometimes defined antitrust markets to include products that are not substitutes. But it has done so only when those products are sold together to the same consumers, see, *e.g.*, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 572 (1966) ("burglar alarm" and "fire alarm" services), or when they exhibit similar competitive conditions and it is convenient to analyze them together, see, *e.g.*, *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 356 (1963) ("commercial banking" services). Neither rationale applies here. Am. Antitrust Inst. Amicus Br. 22.

A manufacturer and its ultimate consumers share an interest in minimizing the costs of distribution, including retailer profit margins. *Leegin*, 551 U.S. at 896. Accordingly, a manufacturer generally will not impose minimum retail prices or other restraints that increase retailer margins unless those restraints increase efficiency or allow the manufacturer's products to compete more effectively against rival brands. *Id.* at 890-891; see Connor Amicus Br. 16-17.

Merchants are not traditional "distributors" of Amex's services: An Amex cardholder goes to the grocery store to buy groceries, not credit-card services. Instead, both merchants and cardholders are *consumers* of credit-card services, and they share an interest in choosing the most efficient means of completing their transactions. The anti-steering rules interfere with that choice by preventing merchants (who bear the direct cost) from influencing cardholders (who select the network). In blocking that communication, the rules do not "promot[e] the most efficient distribution of [Amex's] product" (Amex Br. 28) or otherwise enhance interbrand competition. Instead, they *suppress* competition between Amex and its rivals.

Amex is also wrong to assert (Br. 27) that merchant steering impedes its ability to provide rewards and services that "give cardholders incentives to use their cards." A cardholder offered a 1% discount or similar incentive to use a Discover card remains free to pay with Amex, and will be steered away only if "he believes that what the merchant is offering is of greater value than the rewards or other benefits he receives for using his Amex card." Pet. App. 257a. Steering is efficiency-enhancing because it shifts transactions to other networks only when "both the merchant-consumer and

cardholder-consumer derive a net benefit" from the switch. *Ibid.* Steering thus does not preclude Amex from pursuing a higher-fee, higher-rewards strategy; it simply ensures that the success or failure of that strategy will reflect the preferences of both cardholders and merchants in a competitive environment. See pp. 16-17, *supra*.[7]

Amex also asserts that steering subverts "the relationship of trust between Amex and its cardholders" by undermining "'welcome acceptance'" of Amex cards. Br. 9 (citation omitted). But the United States and the States have not challenged the contractual provisions that prohibit merchants from mischaracterizing Amex's products, disparaging Amex, or charging special fees to Amex users. Pet. App. 249a. Amex does not explain why incentives such as offering customers a discount for using Discover would undermine its relationship with its cardholders (other than by causing some cardholders to conclude that Discover offers a better value). In fact, Amex witnesses conceded at trial that such steering need not interfere with "welcome acceptance." *Id.* at 237a n.53 (citation omitted). And while Amex describes its anti-steering rules as "nondiscrimination provisions" (*e.g.*, Br. 2), a merchant's decision to offer a discount to consumers that choose a good or service that the merchant itself obtains at a lower cost would not ordinarily be viewed as a form of "discrimination."

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[7] For similar reasons, Amex is wrong in suggesting (Br. 9) that steering allows merchants to free-ride on its "investment in cardholder rewards." Rewards and other "investments tied to card use" are "not subject to free-riding" because Amex "does not incur any cost if the cardholder is successfully steered" to another network. Pet. App. 255a-256a.

2. Amex asserts that the anti-steering rules protect its "differentiated business model" and allow it to "compete effectively with Visa and MasterCard." Br. 11 (capitalization altered). But the district court found that Amex's argument is not "supported by the record." Pet. App. 230a. The court emphasized that Amex had "presented no expert testimony, financial analysis, or other direct evidence" that it would "cease to be an effective competitor" without the anti-steering rules. *Id.* at 242a. To the contrary, the court noted that Amex has adapted—and flourished—in markets where steering is allowed. *Id.* at 243a; see, *e.g.*, Australian Retailers Ass'n Amicus Br. 2-23. And it observed that "American Express itself has identified a range of potential, permissible steps" that would "protect its ability to deliver a differentiated product if steering is permitted." Pet. App. 244a. The court thus correctly held that Amex had not carried its burden to establish that the anti-steering rules are reasonably necessary to achieve any legitimate procompetitive benefit in the market for cardholders. See U.S. Br. 52-55.

3. In any event, Amex's asserted procompetitive justifications are not relevant to the only question before this Court. The Court granted certiorari to review the court of appeals' holding that the United States and the States failed to carry their initial burden to establish that the anti-steering rules are prima facie anticompetitive. Pet. i. Amex does not defend the court of appeals' erroneous suggestion that the United States and the States could carry that burden only by anticipating and refuting potential procompetitive justifications for the rules. U.S. Br. 43-47. If this Court vacates the decision below, the court of appeals on remand can consider any properly preserved challenges Amex may

have to the district court's holdings concerning its pro-competitive justifications.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals for further proceedings.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

FEBRUARY 2018

No. 16-1454

IN THE

Supreme Court of the United States

STATES OF OHIO, *et al.*,
Petitioners,

v.

AMERICAN EXPRESS COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICI CURIAE* AHOLD U.S.A., INC.; ALBERTSONS LLC; THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC.; H.E. BUTT GROCERY CO.; HY-VEE, INC.; THE KROGER CO.; MEIJER, INC.; PUBLIX SUPER MARKETS, INC.; RALEY'S; RITE AID CORPORATION; SAFEWAY INC.; SUPERVALU, INC.; AND WALGREEN CO. IN SUPPORT OF PETITIONERS

RICHARD ALAN ARNOLD
KENNY NACHWALTER, P.A.
1441 Brickell Avenue
Suite 1100
Miami, FL 33131
(305) 373-1000
rarnold@knpa.com

PAUL E. SLATER
Counsel of Record
SPERLING & SLATER, P.C.
55 West Monroe Street,
Suite 3200
Chicago, IL 60603
(312) 641-3200
pes@sperling-law.com

Counsel for Amici Curiae

December 14, 2017

[Additional Counsel Listed On Signature Page]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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STATEMENT OF *AMICI CURIAE* INTERESTS

Amici are some of the largest supermarket and drugstore chains in the U.S.[1] All of the *Amici* purchase Amex merchant services. Credit card fees are among the largest and fastest-growing expenses for *Amici*. The source of those high fees is the total lack of interbrand price competition for credit card merchant services.

Amici are among the millions of U.S. merchants who the district court found "cannot inject price competition into the network services industry by encouraging their customers to use their lowest-cost supplier, as they can in other aspects of their business." Pet. App. 198a. Because of the American Express Company's ("Amex") anti-steering rules and the decision of the Second Circuit, *Amici* and millions of other merchants continue to operate without the benefit of price competition for a critical service whose price is ever-increasing. Those increasing prices leave the *Amici* and other merchants in the position of being unable to control their costs or efficiently operate their businesses.

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[1] The parties have consented to the filing of this brief. No party's counsel authored any part of this brief. No party or party's counsel contributed any money to fund the preparation or submission of this brief. No persons or entity other than the *Amici* or their counsel contributed any money to fund the preparation or submission of this the brief. The *Amici* are: Ahold U.S.A., Inc.; Albertsons LLC; The Great Atlantic and Pacific Tea Company, Inc.; H.E. Butt Grocery Co.; Hy-Vee, Inc.; The Kroger Co.; Meijer, Inc.; Publix Super Markets, Inc.; Raley's; Rite Aid Corporation; Safeway Inc.; Supervalu, Inc.; and Walgreen Co.

SUMMARY OF ARGUMENT

The Second Circuit did not disturb the district court's finding that Amex's anti-steering rules obstruct interbrand price competition between Amex, MasterCard, Visa and Discover for the sale of credit card services to merchants. More specifically, the district court held that if a merchant could use discounts or other incentives to encourage their consumers to use less expensive payment cards, they would do so and consumers would respond by switching away from Amex to less-expensive payment cards in order to avail themselves of the merchant-offered discounts, benefits or incentives. Faced with a loss of sales volume due to its comparatively high merchant prices and merchant steering, Amex or other high-priced credit card networks would reduce their prices so that merchants would steer consumers to them, rather than away from them. Pet. App. 217a. The resulting price competition among the credit card networks to obtain greater sales by lowering price would drive down the prices charged by all four of the credit card networks to merchants. *Id.* at 216a-17a. If a credit card network, such as Amex, refused to compete on price and lower its merchant prices to a lower competitive level, it would suffer the procompetitive consequences – the loss of sales due to its comparatively high price.[2]

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[2] The Amex contention that its fees cannot be determined to be supracompetitive without considering Amex's costs and profit margin is incorrect. If Amex's anti-steering rules stifle interbrand price competition (as the District Court found – Pet. App. 192a) and Amex's prices would go down if that price competition was allowed to occur (as the District Court also found - Pet. App. 217a), then Amex's prices are, by definition, above the rate that would prevail under competitive conditions.

Although the Second Circuit did not disturb the district court's finding of an injury to price competition among Amex, MasterCard, Visa and Discover for the sale of credit card services to merchants, it did hold that (1) the relevant product market necessarily includes the sale by Amex of credit card services to both merchants and cardholders, and (2) the Government did not make out a *prima facie* case of injury to competition because it did not prove that the injury to price competition for the sale of services to merchants was not outweighed by hypothetical benefits to competition for the sale of services to cardholders. Pet. App. 32a, 43a-44a, 53a. The district court's ruling that Amex had failed to come forward with any evidence of offsetting procompetitive effects was deemed irrelevant, because the Government had not made out a *prima facie* case and the burden of coming forward with evidence of offsetting, procompetitive effects therefore never shifted to Amex.

First, the Second Circuit's relevant market analysis is incorrect as a matter of law. It is only products or services that are close substitutes for each other and exhibit a high degree of cross-elasticity of demand that belong in the same relevant market. Cardholder network services are not a substitute for and exhibit no cross-elasticity of demand with merchant network services. They do not belong in the same relevant market. Furthermore, in a case such as this, where cardholder and merchant network services cannot be in the same relevant market—and where the Government proved by direct evidence that Amex's anti-steering rules injured interbrand price competition for the sale of network services to merchants—there is no further need to engage in "detailed market analysis" in order to prove a Rule of Reason violation. *See FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460 (1986).

Second, the Appellate Court erred, both legally and factually, in holding that the Government did not establish an injury to competition and that Amex was not obligated under the Rule of Reason to come forward with evidence of offsetting procompetitive effects. As a factual matter, the Second Circuit left undisturbed the district court's finding that Amex's anti-steering rules caused the following injuries to competition: (1) the anti-steering rules injured inter-brand price competition for the sale of credit card services to merchants, which, at a minimum, injures competition with regard to a component of a two-sided price and, by itself, constitutes an injury to competition; (2) erected barriers to entry or expansion into a highly concentrated industry; (3) eliminated consumer choice; and (4) injured retail consumers by raising the price they pay for goods and services. Individually and collectively these injuries to competition violate the Rule of Reason unless there are offsetting pro-competitive effects. Amex bore the burden of coming forward with evidence of such procompetitive effects. The district court found that Amex failed to do so. Pet. App. 229a. The Second Circuit leaves that finding, too, undisturbed.

The Second Circuit did identify two hypothetical justifications for Amex's anti-steering rules. First, it stated that Amex needs to "balance" the price it charges to merchants and the price it charges cardholders. Second, it held that because Amex might use some of the supracompetitive price it extracts from merchants to increase cardholder rewards (*i.e.*, lower cardholder price), that its conduct might be beneficial. Neither of these supposed justifications have merit. Nor do the rewards given to Amex cardholders as a result of its supracompetitive merchant prices constitute a procompetitive "net" benefit to even a two-sided

market. The supracompetitive merchant prices are passed on to all consumers in the form of higher retail prices, but the rewards are not passed on to all consumers. The vast majority of consumers do not use Amex cards; receive no Amex rewards; and suffer a deadweight loss. Only a fraction of the merchant fees collected by Amex are passed on to even its cardholders. Contrary to the Second Circuit's assumption, the Amex rewards are not free. They impose a cost on all consumers, only a fraction of which is passed on to only a fraction of those consumers.

ARGUMENT

I. Because the Government Proved by Direct Evidence that Amex Injured Interbrand Price Competition For the Sale of Merchant Services, There Was No Need for Further Detailed Market Analysis

The Second Circuit held that the "District Court's definition of the relevant market in this case is fatal to its conclusion that Amex violated §1." Pet. App. 31a. According to the Second Circuit, the district court should have "collapsed" the market for the sale of services to cardholders and the market for the sale of services to merchants into one "platform-wide market." Pet. App. 32a. The card-issuing services sold to cardholders and the card acceptance services sold to merchants are not, however, interchangeable products and exhibit neither substitutability nor cross-elasticity of demand. If the price of card acceptance services goes up, a merchant cannot shift to purchasing cardholder services and vice versa. The services are not substitute products. They exhibit no cross-elasticity of demand and cannot be placed in the same relevant market. *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 325 (1962) ("[t]he outer boundaries of a product market are

determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it"); *U.S. v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 404 (1956) (relevant market includes products that have "reasonable interchangeability for the purposes for which they are produced"). Indeed, far from being substitutes, merchant services and cardholder services are actually complementary products. *See* Phillip E. Areeda & Herbert J. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, 2017 Supp., ¶565, p. 104 (June 2017) (stating that the Second Circuit erred because Amex's merchant and cardholder services "are not substitutes for one another but rather behave more like complements").

Where, as here, cardholder network services and merchant network services cannot be in the same relevant market as a matter of law, and the elimination of interbrand price competition is proved with direct evidence, there is no need to engage in further detailed market analysis. The purpose of defining a relevant market is to determine whether the defendant has sufficient market power to injure competition. The existence of such market power may be determined by defining the market; measuring the defendant's market share; and inferring from a high market share that the defendant has sufficient power to injure competition. *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 96, 98-99 (2d Cir. 1998). Such detailed measurement of the market is not, however, always necessary. Where there is sufficient direct proof that the defendant has injured industry-wide interbrand price competition, there is no need to separately determine whether the defendant has sufficient market power to injure competition. It is already established that the defendant has such power and has exercised

it. As a result, there is no need for further market analysis from which such power might be inferred.

The controlling authority is this Court's decision in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986). In that case, a group of dentists agreed that they would not make X-rays available to insurance companies even if patients asked them to do so. The FTC's finding of a §1 Sherman Act violation was reversed by the Seventh Circuit because the FTC had failed to offer a "definition of the market in which the Federation was alleged to have restrained competition and to establish that the Federation had the power to restrain competition in that market." *Id.* at 453. This Court reversed the Seventh Circuit ruling. It held that the "Commission's failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason." *Id.* at 460.

This Court reasoned that the FTC had shown actual adverse effects on competition because patients were unable to obtain the services they demanded and insurers were "actually unable to obtain compliance with their requests for submission of x-rays . . ." *Id.* This Court then held that the proof of "actual, sustained adverse effects on competition" obviated the need for further market analysis:

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as a reduction of output," can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects." 7 P. Areeda, Antitrust Law ¶1511, p. 429 (1986). In this case, we conclude that the finding of

> actual, sustained adverse effects on competition . . . is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis.

476 U.S. at 460-61.

The current case is remarkably similar. Here, the Government proved an adverse effect on interbrand price competition among all four credit card networks. Amex's anti-steering rules did not just impact a competitor. Its anti-steering rules eliminated price competition on an industry-wide basis and resulted in all four networks charging supracompetitive prices to all merchants.[3] Under this Court's precedent, the exclusion of cardholders from the relevant market and the direct proof of actual adverse effects on industry-wide price competition for the sale of services to merchants obviates the need to engage in a more detailed relevant market analysis so as to measure Amex's power and infer from it Amex's ability to injure interbrand competition.

II. The Government Proved an Injury to Competition

The Second Circuit held that the Government did not demonstrate a *prima facie* injury to competition because it did not prove that the price paid by merchants to Amex went up more than the price paid by cardholders to Amex went down. Pet. App. 53a (holding that the Government did not show an

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[3] Merchants who accept Amex cards account for more than 90% of the retail sales in the U.S. (measured by dollar volume of sales). Pet. App. 188a, n.40.

anticompetitive effect because it failed to offer "evidence of the net price affecting consumers on both sides of the platform" and failed to provide "a reliable measure of American Express's two-sided price that appropriately accounts for the value or cost of the rewards paid to cardholders"). This holding ignores undisputed findings of fact and incorrectly focuses only on the Amex price while ignoring the injury to price competition between Amex, MasterCard, Visa and Discover. The Second Circuit Opinion also ignores the unchallenged findings that Amex's anti-steering rules (1) erected barriers to entry or expansion into an already highly concentrated market; (2) stifled consumer choice; and (3) caused all consumers to pay higher retail prices regardless of the payment form they use or the rewards they receive.

A. The Government Proved an Injury to Interbrand Price Competition

The district court found that Amex's anti-steering rules obstruct interbrand price competition between MasterCard, Visa, Amex and Discover and cause the merchant prices charged by all four of those card networks to be higher than they otherwise would be. Pet. App. 192a. The Second Circuit Opinion ignores these findings and focuses instead on the question of whether the net Amex price to merchants and to cardholders goes up. But even if the Amex net two-sided price does not go up (as explained below, it does), the Amex anti-steering rules nonetheless eliminate the competitive incentive that Discover, MasterCard and Visa would otherwise have to compete on price by lowering their merchant fees because, in the absence of merchant steering, a card network's lower merchant price will not be rewarded with greater network sales. Pet. App. 192a, 195-98a. The result is that price

competition among all four of the credit card networks is eliminated and the prices charged by all four of the networks are "dramatically" higher than they otherwise would be. Pet. App. 71a, 192a, 195a-98a. The Second Circuit Opinion omits all reference to these dispositive, undisputed findings by the district court.

Furthermore, even if one assumes (incorrectly) that the relevant market includes both sides of the two-sided platform, and that the net price to both sides must be considered, an injury to competition within the meaning of the Sherman Act is still clearly present. In *Catalano v. Target Sales*, 446 U.S. 643 (1980), the defendants obstructed competition over credit terms. This Court held that credit terms were "an inseparable *part* of price" and that the agreement in question was an unlawful restraint. *Id.* at 648. Similarly here, even if Amex operates a two-sided platform and collects a net two-sided price, the merchant price is nonetheless an "inseparable part" of that net two-sided price. At the very least, Amex was, therefore, found to have obstructed competition with regard to an inseparable component of price. According to *Catalano*, that constitutes an actionable injury to competition. That injury must be justified by evidence of offsetting procompetitive effects if it is to withstand scrutiny under the Rule of Reason; and it is Amex's burden to come forward with such evidence.[4] The Second Circuit did not even assert that Amex did so.

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[4] *See FTC v. Actavis*, 133 S. Ct. 2223, 2236 (2013) (holding that "[a]n antitrust defendant may show . . . legitimate justifications are present" in order to show lawfulness under the Rule of Reason); *Cal. Dental Ass'n. v. FTC*, 526 U.S. 756, 788 (1999) (Breyer, J. concurring in part) ("[T]he defendant bears the burden of establishing a procompetitive justification"); Areeda & Hovenkamp, *Antitrust Law*, 2017 Supplement, ¶1505, p. 171

B. The Government Proved that Amex Erected Barriers to Entry or Expansion into a Highly Concentrated Industry

The Second Circuit acknowledged that credit cards are a highly concentrated industry in which Visa has a 45% share, Amex a 26.4% share, MasterCard a 23% share and Discover a 5.3% share.[5] Pet. App. 13a. The Second Circuit also acknowledged that the credit card industry is "characterized by formidable barriers to entry." Pet. App. 17a. In that setting, the district court held that Amex's anti-steering rules erect further barriers to entry and "render it nearly impossible for a firm to enter the relevant market" by offering a lower-priced service. Pet. App. 203a. The district court specifically pointed to Discover as a network that attempted to expand its market position by offering merchants progressively lower prices in return for the merchant steering customers to the Discover card. *Id.* The district court found that because of the Amex anti-steering rules "Discover or any potential new entrant" was denied the opportunity to offer lower merchant fees in return for greater sales and it was nearly

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(stating that in the *Amex* case the Government met its burden of showing a *prima facie* case and that the "burden should [have] shift[ed] to [Amex] to show a justification.").

[5] In the courts below, Amex repeatedly claimed that the credit card market is dominated by its "larger competitors," MasterCard and Visa. In fact, Amex's market share is larger than MasterCard's. The Herfindahl-Hirschman Index ("HHI") is a measure of market concentration that is calculated by summing the squares of the shares of the industry participants. The HHI for the credit card industry is 3279. According to the 2010 U.S. Department of Justice and FTC Horizontal Merger Guidelines, §5.3, an HHI of 2500 or more indicates a highly concentrated market.

impossible for a competitor to enter the market "by offering merchants a low-cost alternative to existing networks." *Id.* The district court further found that Amex's anti-steering rules thereby "impede modes of competition that likely would benefit consumers on both sides of the [credit card] platform." *Id.* Amex did not challenge any of these findings on appeal. The Second Circuit Opinion fails to mention these critical facts.

This Court has repeatedly held that the erection of barriers to entry or expansion constitutes an adverse effect on competition. In *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 485 (1992), this Court stated that "one of the evils proscribed by the antitrust laws is the creation of entry barriers to potential competitors[.]" *See also U.S. v. Am. Tobacco Co.*, 221 U.S. 106, 183 (1922) (defendants' conduct held anticompetitive, in part, because it erected "perpetual barriers to entry of others into the tobacco trade"); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 (1984) (holding conduct to be anticompetitive if it "could either harm existing competitors or create barriers to entry of new competitors . . ."), *abrogated on other grounds by Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006). The erection of barriers to entry or expansion is particularly problematic (1) where, as here, the market is already highly concentrated (*FTC v. Consol. Foods Corp.*, 380 U.S. 592, 601 (1965) (finding anticompetitive conduct because the "oligopoly structure of the industry is strengthened and solidified and new entry is discouraged")) or (2) where a small, aggressive competitor, such as Discover, stands ready, willing and able to compete by

offering lower prices, but is thwarted by the defendants' conduct (Pet. App. 205a-06a[6]); *see FTC v. Proctor & Gamble Co.*, 386 U.S. 568, 578 (1967) (conduct in question held anticompetitive where it "may substantially reduce the competitive structure of the industry by raising entry barriers and dissuading the smaller firms from aggressively competing").[7]

Amex has never offered evidence of a procompetitive justification for erecting barriers to entry or expansion by alternative credit card networks. Those networks, had they been able to enter or expand in that market, would have competed on both sides of the platform and would have deconcentrated the highly concentrated credit card market to the benefit of both merchants and cardholders, alike. In the district court, Amex did not "strenuously dispute the evidence regarding the effect of anti-steering rules on Discover's low-price model, or that such restrictions effectively raise a barrier to entry" for firms that would offer lower prices. Pet. App. 205a-06a. In the Second Circuit, Amex omitted all reference to the findings that its anti-steering rules raise barriers to entry into a highly concentrated market by would-be price-cutters. The erection of such barriers to entry, by itself, constitutes an actionable injury to competition on both sides of the credit card platform. Amex has never attempted to

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[6] The CEO of Discover testified that Discover is still prepared to offer lower prices to merchants while offering competitive rewards to cardholders if the Amex anti-steering rules are removed. Pet. App. 219a,

[7] Amex's anti-steering rules also prevented two merchant-owned card networks from entering the highly concentrated credit card market. Pet. App. 213a-14a.

justify that injury to competition under the Rule of Reason and the district court judgment in favor of the Government may be affirmed on that ground alone.

C. The Government Proved that Amex's Anti-Steering Rules Injured Consumer Choice

One of the primary purposes of the Sherman Act is to maximize consumer choice. *Associated Gen. Contractors v. Cal. State Council*, 459 U.S. 519, 528 (1983) ("activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect"); *Ind. Fed'n of Dentists*, 476 U.S. at 459 ("[a]n agreement limiting consumer choice by impeding the ordinary give and take of the market place . . . cannot be sustained under the Rule of Reason"); *NCAA v. Bd. of Regents*, 468 U.S. 85, 107 (1984) ("[A] restraint that has the effect of reducing the importance of consumer preference in setting price" is inconsistent "with this fundamental goal of antitrust law"); *Nat'l Soc'y of Prof'l Eng'rs v. U.S.*, 435 U.S. 679, 693-94 (1978) (conduct that "substantially deprives the customer of the ability to utilize and compare prices" adversely affects competition) (internal quotation omitted).

The explicit purpose and competitive effect of Amex's anti-steering rules is to prevent consumers from being offered a competitive choice. The anti-steering rules specifically prohibit merchants from offering a customer (1) a discount to use a less-expensive card; (2) free goods to use a less-expensive card; (3) free services (*i.e.*, shorter checkout line, free delivery, free parking, preferred seating, or the like); or (4) merchant-sponsored reward points. Pet. App. 219a. Even if one

assumes that the effect on cardholders should be included in the competitive analysis, the district court correctly held that there is no reason to believe that the cardholder is better off if he or she receives reward points from Amex, but is never given the choice of receiving the incentive, discount, benefits or reward points that the merchants would offer if they were allowed to do so. *Id.* Indeed, a consumer is necessarily better off if he or she is given a choice between (a) using the Amex card and receiving Amex reward points or (b) switching to an alternative card and receiving the merchant-offered discount, benefit or incentive. If the consumer really prefers the Amex card and the Amex rewards, he can use the Amex card. It is only when a consumer prefers the merchant incentive, reward or discount that Amex will lose a transaction. But if the consumer prefers the merchant reward or incentive, Amex should lose the transaction. The explicit purpose of the anti-steering rules is to prevent the consumer from being offered that pro-competitive choice.

The Second Circuit incorrectly assumed that consumers are better off if they are offered Amex rewards and are given no opportunity to choose an alternative incentive offered by the merchant. In reality, the consumer is necessarily better off, and competition is enhanced, if he or she has the ability to choose his or her preferred reward, discount or incentive. Amex may believe that the consumer is better off if he or she uses the Amex card, but that is a decision that only the consumer can make. It is the ability of the consumer to be offered and make that procompetitive choice that is targeted and eliminated by Amex's anti-steering

rules.[8] The elimination of that procompetitive, consumer choice is an adverse effect on competition. Amex has offered and the Second Circuit has identified no legally cognizable procompetitive justification for that adverse effect on competition. As a result, it violates the Rule of Reason. *Ind. Fed'n of Dentists*, 476 U.S. at 460-62 (even where the challenged conduct is not a naked restraint, obstructing consumers' ability to choose a desired product or service violates the Rule of Reason); *Nat'l Soc'y Prof'l Eng'rs*, 435 U.S. at 692-93 (preventing consumers from comparing price in order to make a purchase choice violates the Rule of Reason).

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[8] Amex has argued that, like vertical price-fixing, its anti-steering rules are intended to increase interbrand competition. Nothing could be further from the truth. In a vertical price-fixing case, a manufacturer prohibits its distributors from either raising or lowering the resale price of the manufacturer's product. Potentially, at least, that will allow the manufacturer's product to better compete against the products of other manufacturers, *i.e.*, interbrand competition. Here, Amex allows merchants to either raise the price charged to customers who use an Amex card (*i.e.*, a surcharge) or lower the price charged to the user of an alternative card *so long as the other card is surcharged the identical amount that Amex is surcharged or Amex's card is granted the identical discount that the alternative card receives. See* J. A. 97. The merchant is free to offer discounts or impose surcharges *so long as the price charged for using the Amex card and the competitive cards* ***is*** *identical* – meaning that interbrand price competition is literally prohibited.

D. The Government Proved an Injury to Consumers[9]

Neither Amex nor the Second Circuit denies that horizontal price competition among credit card networks for the sale of credit card services to merchants is injured by Amex's anti-steering rules. Instead, Amex argues that the Government's initial burden required additional proof that hypothetical benefits to cardholder competition did not outweigh the injury to competition for the sale of credit card services to merchants. The law, however, does not allow a competitive injury in one sector to be offset by a supposed competitive benefit in another sector. *U.S. v. Topco Ass'n, Inc.*, 405 U.S. 596, 609-10 (1972) (holding that courts have "an inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector"). But, even if it were permitted, the manner in which the Second Circuit weighed an injury to competition in one market against a hypothetical benefit to competition in another market is plainly incorrect.

Contrary to Amex's view, not all consumers, and possibly none of them, receive a benefit when Amex passes on some of its anticompetitive increase in merchant prices to its cardholders in the form of reward points. First, the vast majority of retail

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[9] The trial court correctly held that merchants "are the relevant consumers" of the network services sold to them by Amex. Pet. App. 70a. Merchants clearly suffer antitrust injury when the prices they pay "rise dramatically" due to the elimination of price competition among the sellers of the service they purchase. Pet. App. 71a. This section of this *Amicus* Brief explains that retail customers, who are the consumers of the services sold to cardholders, are also injured by Amex's anticompetitive conduct.

consumers do not use Amex cards and do not receive any Amex reward points. Because the retailers pass on to all of their customers the higher cost of the merchant fees (Pet. App. 68a, 192a, 210a-11a), the consumers who do not carry or qualify for an Amex card suffer a dead-weight loss. Pet. App. 211a. They receive no Amex rewards or benefits, but must pay higher merchant prices. *Id.* Those consumers are also deprived of the rewards and incentives that merchants would offer to customers to refrain from using the relatively high-cost Amex card.[10]

Second, even the Amex cardholders may be worse off. It is undisputed that Amex, at most, passes on only a fraction of its merchant fees to cardholders.[11]

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[10] Amex may object that under the principles of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), it is impermissible to take into consideration the price effects on consumers that is passed on to them by the injured merchants. It is Amex, however, who argues that the Court should take into consideration the impact of higher merchant fees which are allegedly passed on by Amex to its cardholders in the form of higher rewards points. Amex cannot have it both ways. If the pass-on effects on the consumers who use the Amex card and receive Amex reward points is considered, then the effect on the consumers of the higher merchant credit card fees that are passed on to them in the form of higher retail prices must be taken into consideration, as well.

[11] Amex spends less than half of its revenue from merchant fees on the reward points that it gives to cardholders. Pet. App. 209a-10a, Tr. 3572 (Silverman/Amex). Amex admitted that a significant part of the premium fees it receives from merchants drop to its bottom line. Pet. App. 209a. In fact, Amex admitted that it could reduce merchant fees by $1 billion while keeping cardholder rewards at the same level. Only shareholder return would go down. Tr. 3537 (Silverman/Amex). Amex further admitted that there is no direct connection between the level of merchant prices it charges and the amount of rewards that it gives to cardholders. Tr. 3575 (Silverman/Amex).

Depending on what products Amex cardholders buy, and how the merchant prices its various products in order to recoup the excessively high merchant fees, even Amex cardholders might pay a higher net price than they otherwise would due to Amex's anti-steering rules.[12] Amex came forward with no evidence to show that its anti-steering rules result in its cardholders receiving additional reward points that are of greater value than the amount by which the products they purchased go up in price. The burden of coming forward with such evidence was on Amex. Having failed to meet that burden, its conduct violated the Rule of Reason.

Third, if one considers all retail consumers as a group, it is undisputed that because of Amex's anti-steering rules those consumers pay an increase in retail prices that are greater than any increase in the value of reward points given out by Amex. This is true because (1) the merchants pass on any increase in the cost of accepting Amex cards to their customers (Pet. App. 68a, 192a, 210a-11a), and (2) Amex uses only a fraction of the fees it receives from merchants to purchase rewards for cardholders[13] and often passes on none of the revenue from its merchant price increases to its cardholders.[14] A significant portion of

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[12] In other words, the retail price of the goods that an Amex cardholder buys might go up more than the value of the reward points that he or she receives.

[13] *See* n.11, *supra*.

[14] From 2005-2010, Amex's merchant price increases "resulted in $1.3 billion in incremental income." Pet. App. 170a. Those price increases "were not paired with offsetting adjustments on the cardholder side of the platform." *Id.* at 166a-67a; *see also id.* at 209a. Amex admits that not all of its "gains from increased merchant fees are passed along to cardholders." *Id.* at 51a.

Amex's price increases to the merchants drops to Amex's bottom line for the benefit of its shareholders. Pet. App. 209a; Tr. 3572 (Silverman/Amex). Consumers, as a group, get back significantly less in rewards than they must pay to cover the increase in retail prices. Contrary to the Second Circuit's view, the "net" price effect of Amex's anti-steering rules is known. Amex's profits go up and retail customers pay more for the goods they receive – even if one subtracts the value of Amex rewards.

The defect in the Second Circuit's reasoning is simple. It treats the reward points given to Amex cardholders as a free benefit that can be subtracted from the increase in price paid by the merchants. The reward points, however, are not free. They are paid for by merchant fees, and the merchants pass that amount on to the consumers. If Amex gave back to all of the consumers the full amount of the increase in fees that it collects from the merchants in the form of rewards to consumers, the transaction would be a wash – at least as to the consumers. But Amex does not do that. It gives back reward points to only some of the consumers and gives back less than it takes in from the merchants and less than the merchants pass on to the consumers in the form of higher prices. The obstruction to interbrand price competition for the sale of credit card services to merchants that is caused by the anti-steering rules has only one winner – Amex. The merchants and the retail consumers both suffer a net loss.

III. The Need to "Balance" the Prices Charged to Both Sides of a Two-Sided Platform Is Not a Procompetitive Justification

In order to be successful a credit card network must attract customers to both sides of its platform. Pet. App. 9a. This is because a cardholder might not want to hold a card unless it is accepted at enough merchants and a merchant might not want to accept a card unless it is used by a sufficient number of customers.[15] The Second Circuit held that a credit card platform must therefore "find an effective method for balancing the prices on the two sides of the market." *Id.* This, according to the Second Circuit, puts cardholders and merchants in opposition to each other because merchants want to pay a lower price and cardholders want to receive more reward points. Pet. App. 10a, n.10.

The Second Circuit held that the two sides of the payment card platform have different "demand sensitivities" (*i.e.*, price elasticity of demand) (Pet. App. 9a, n.9); that the cardholders are less willing to pay to use a card than the merchants are to accept a card; and, that Amex, therefore, seeks to "balance the two sides of its platform" by charging cardholders a lower price (*i.e.*, more reward points) and charging merchants a higher price. The high merchant price results in merchants wanting to steer customers away from the higher-cost Amex cards and to lower-cost cards by giving the customers discounts, or other incentives to use the lower-cost cards. As previously stated, the use of such discounts or incentives, if permitted, would

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[15] If accepting an additional card imposes no or very low marginal costs on the merchant, the merchant will likely accept a card even if it is used by very few customers.

stimulate price competition between the credit card networks as each network would seek to lower its price so that merchants would steer consumers to its cards rather than away from its cards. In other words, if merchants are allowed to steer to lower-cost cards, the networks will have to compete on price by cutting the merchant price in order to avoid the loss of sales volume that would result from merchant steering. Pet. App. 71a. In the alternative, a card network might keep its merchant price high, but suffer the procompetitive consequence of lower sales volume – just as should happen in a competitive market.

The Second Circuit, however, holds that the use of differential pricing by the merchants to steer consumers to lower-cost credit cards, and the interbrand price competition that it stimulates, "can be harmful insofar as it interferes with the network's ability to balance its two-sided net price." Pet. App. 21a. A merchant's ability to steer, however, does not interfere in any way with Amex's ability to "balance" the prices it charges to either side of the platform or to set any price it wants for both merchants and cardholders. Amex is free to choose any merchant price and any cardholder price that it prefers. The right of a seller to set its price or to seek to "balance" the prices it charges the two sides of a platform does not, however, imply a right to obtain those preferred prices in the face of the interbrand price competition that would lead to different competitively determined market price or "balance." Competition, not Amex's preference for a certain price pair, must determine the market prices on both sides of the platform. *See* Areeda & Hovenkamp, *Antitrust Law*, 2017 Supplement, ¶562(e), p. 101 (stating that the Second Circuit "failed to see . . . that under the antitrust policy *competition* should choose the optimal mix of revenue as between the two sides . . . . "). The

Sherman Act precludes Amex from obstructing price competition so as to achieve the prices or "balance" it prefers. As a matter of law, it is the free market mechanism that makes that decision – not Amex.

CONCLUSION

The Second Circuit leaves undisturbed the district court's findings that Amex's anti-steering rules (1) stifle interbrand price competition for the sale of credit card services to merchants, (2) erect barriers to entry, especially to low-price providers, into a highly concentrated industry, (3) eliminate consumer choice, and (4) raise the prices that millions of consumers, who receive no Amex reward points, pay for goods and services. Amex does not assert that these findings are clearly erroneous. Because these adverse effects on competition were proved by direct evidence, and because network cardholder services and network merchant services cannot as a matter of law be in the same relevant market, there is no need for further detailed market analysis.

Under the Rule of Reason, the burden of coming forward with evidence of offsetting procompetitive effects was on Amex. Even if alleged procompetitive effects in the cardholder market could be used to offset an injury to competition in the merchant market, it is clear that Amex failed, both legally and factually, to present evidence of any legally cognizable procompetitive effect.

Thus, under the Rule of Reason, the Government proved an adverse effect on competition and Amex failed to demonstrate any procompetitive effect. As a result, a Rule of Reason violation has been proved. *Amici*, therefore, respectfully submit that this Court should reverse the Second Circuit ruling and remand

this case with instructions to affirm the judgement of the district court.

Respectfully submitted,

RICHARD ALAN ARNOLD
KENNY NACHWALTER, P.A.
1441 Brickell Avenue
Suite 1100
Miami, FL 33131
(305) 373-1000
rarnold@knpa.com

WILLIAM J. BLECHMAN
KENNY NACHWALTER, P.A.
1441 Brickell Avenue
Suite 1100
Miami, FL 33131
(305) 373-1000
wblechman@knpa.com

JOSEPH M. VANEK
DAVID P. GERMAINE
VANEK, VICKERS
& MASINI, P.C.
55 West Monroe Street
Suite 3500
Chicago, IL 60603
(312) 224-1500
jvanek@vaneklaw.com
dgermaine@vaneklaw.com

MATTHEW T. SLATER
SPERLING & SLATER, P.C.
55 West Monroe Street
Suite 3200
Chicago, IL 60603
(312) 641-3200
mslater@sperling-law.com

PAUL E. SLATER
Counsel of Record
SPERLING & SLATER, P.C.
55 West Monroe Street
Suite 3200
Chicago, IL 60603
(312) 641-3200
pes@sperling-law.com

ERIC L. BLOOM
HANGLEY ARONCHICK
SEGAL PUDLIN
& SCHILLER
4400 Deer Path Road
Suite 200
Harrisburg, PA 17110
(717) 364-1003
ebloom@hangley.com

PHILLIP F. CRAMER
RYAN T. HOLT
ERIC G. OSBORNE
SHERRARD ROE VOIGT
& HARBISON
150 3rd Avenue South
Suite 1100
Nashville, TN 37201
(615) 742-4200
pcramer@srvhlaw.com
rholt@srvhlaw.com
eosborne@srvhlaw.com

Counsel for Amici Curiae

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IN THE

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STATE OF OHIO, ET AL.,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, ET AL.,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

RICHARD M. BRUNELL
Counsel of Record
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 600-9640
rbrunell@antitrustinstitute.org

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INTEREST OF AMICUS CURIAE

The American Antitrust Institute ("AAI") is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.[1] AAI submits this brief because the Second Circuit's rule requiring plaintiffs to show "overall harm" to both sides of a two-sided platform to establish a prima facie case is inconsistent with basic antitrust principles and, if adopted, would significantly impair the enforcement of the antitrust laws.

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[1] The written consents of all parties to the filing of this brief have been lodged with the Clerk. Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions. Certain members of the Advisory Board who represent (or whose firms represent) parties in related private litigation against American Express were recused from any involvement in this brief. No counsel for a party has authored this brief in whole or in part, and no person other than amicus curiae has made a monetary contribution to fund its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Are two-sided platforms sufficiently unique to require an exemption from the normal rules for defining relevant markets and assigning the burdens of proof in a rule of reason case? Until the court of appeals' decision below, no court had so held. And neither the Second Circuit nor American Express (Amex) has made the legal or economic case for adopting a more demanding rule of reason for markets involving two-sided platforms than for other markets. While two-sided platforms may involve feedback effects between the two sides, such effects do not warrant special antitrust rules. Feedback effects are common in the economy and so are two-sided platforms. Precedent and good antitrust policy favor the application of ordinary, well-established antitrust principles to two-sided platforms. *Cf. United States v. Microsoft Corp.*, 253 F.3d 34, 49-50 (D.C. Cir. 2001) (en banc) (applying traditional antitrust principles to monopolization of technologically dynamic operating system market which involved a two-sided platform characterized by substantial network effects).

The district court held that Amex's anti-steering restrictions on merchants violate the rule of reason. The anti-steering provisions (which Amex refers to as "non-discrimination provisions," or NDPs) prevent merchants that accept Amex cards from offering inducements to consumers to use other credit cards or payment methods (except cash or the like) that have lower merchant fees, or even from truthfully inform-

ing consumers of the comparative costs of using an Amex card.

The district court found that the United States and several States (plaintiffs) had made out a prima facie case that the anti-steering provisions were anti-competitive interbrand restraints because they eliminated incentives for any of the credit card platforms (Amex, Visa, MasterCard and Discover) to compete for merchants on the basis of lower merchant fees. The court found that this had the effect of raising merchant fees across the market, which merchants passed on to *all* consumers (regardless of the form of payment used) in the form of higher prices for their goods and services. Moreover, the restraints deterred entry of new, low-cost business models and thereby impaired innovation and consumer choice. On factual and legal grounds, the district court rejected the pro-competitive justifications proffered by Amex that the restraints enabled Amex to provide its cardholders with high rewards and thereby to preserve its differentiated business model and that the restraints were needed to prevent free riding by merchants.

The Second Circuit reversed, concluding that plaintiffs had failed to establish a prima facie case. The court of appeals held that plaintiffs had not met their burden of showing anticompetitive harm because they purportedly failed to account for the benefits to Amex cardholders from the restraint. According to the court, plaintiffs were required to show "an actual adverse effect on competition in the market *as a whole*," which meant showing that "*all* Amex consumers on both sides of the platform" were

harmed. Pet. App. 49a, 51a (internal quotation marks omitted).

This ruling should be reversed for several reasons.

1. A prima facie case does not require showing harm to both sides of a two-sided platform. The court of appeals' conclusion to the contrary is flawed, as an initial matter, because the relevant harms and benefits are those to the market(s) and consumers as a whole; even if higher benefits to Amex cardholders fully offset the higher fees charged to Amex merchants, anticompetitive harm would remain. In any event, an overall harm requirement is not legally supportable. The case law involving two-sided platforms does not impose such a requirement. Nor can such a requirement rest on plaintiffs' supposedly erroneous market definition, for two reasons. First, as explained in the next part, a relevant market may comprise one side of a two-sided platform. And second, a showing of actual detrimental effects, which the district court found here, obviates the need for plaintiffs to define a relevant market.

An "overall harm" requirement is not supported by a danger of "false positives." Assuming *arguendo* that increased benefits to Amex cardholders may properly be considered to be a procompetitive benefit, rather than part of the distortion of the competitive process, separating the cardholder and merchant sides of the platform means only that establishing anticompetitive harm on the merchant side shifts the burden to the defendant to establish offsetting benefits on the cardholder side. Neither Amex nor the

court of appeals has suggested that the government was in a better position to *disprove* offsetting benefits to Amex cardholders than Amex was to prove them as normally required under the rule of reason. Nor does the likelihood of *some* offsetting benefits logically imply that the burden should be on the plaintiffs to show overall harm in the first place. And since only a portion of Amex's higher merchant fees were passed along to cardholders in the form of rewards, it is plain that plaintiffs did establish overall harm, at least sufficiently to shift the burden to Amex to show otherwise.

Other considerations do not warrant a heightened burden to make out a prima facie case. The fact that the restraint is vertical rather than horizontal makes no difference. In *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), this Court held that a vertical *intrabrand* price restraint is subject to the conventional rule of reason. A vertical restraint that impedes *interbrand* competition, as here, certainly warrants no more favorable treatment. If anything, it warrants less favorable treatment. *Leegin* identified circumstances analogous to those here as requiring "careful scrutiny." Nor is it appropriate to raise plaintiffs' initial burden based on a court's *impression* that the defendant has legitimate procompetitive justifications, as the court of appeals appear to have done here.

2. A relevant market may comprise one side of a two-sided platform. Indeed, combining two complementary sides of credit card platforms violates basic principles of market definition, which focus solely on demand substitution factors. That there are feedback

effects between two sides of the platform is not a ground for combining the two complementary services in a single relevant market. Feedback effects can be taken into account even if the market is defined as one side, as the plaintiffs did in this case. Nor is it appropriate to combine the two sides on the theory that they are part of the same product, or have no functionality without the other. Functionally linked products may be in separate product markets even when they are sold to the same consumers; when they involve completely different groups of consumers involving different market circumstances they are necessarily in different product markets.

Times-Picayune Publ'g Co. v. United States, 345 U.S. 594 (1953), supports applying standard market-definition principles to two-sided platforms. In that case, which involved tying sales of advertising in one newspaper edition to sales in another edition, this Court recognized the interdependence of the subscriber and advertiser markets and found error in conflating the two markets. Amex's grounds for distinguishing *Times-Picayune* lack merit.

While this Court has recognized that complementary products may sometimes be combined in "cluster" markets, the conditions for such clustering, namely administrative convenience or the recognition that the cost of a basket of products *sold to the same consumers* is lower than the cost of providing the products separately, are not applicable here.

3. Raising the burden of production on plaintiffs to make out a prima facie case in cases involving two-sided platforms would harm competition by discour-

aging some meritorious claims and encouraging anti-competitive conduct, i.e., raising the risk of "false negatives." This is particularly of concern because, as all agree, two-sided platforms are increasingly common. And the economics of internet platforms often lead to successful firms dominating their markets because of significant barriers to entry from network effects, among other things. Accepting the logic of the court of appeals would raise the burden on plaintiffs to show unlawful monopolization by a dominant platform even when the firm engages in exclusion for the sole purpose of raising prices or deterring innovation. Moreover, it may call into question the applicability of the per se rule to price fixing on one side of a two-sided platform.

The Second Circuit's special rules would add undue complexity, cost, and uncertainty to already complicated and lengthy litigation under the rule of reason. Even without the extra burden, it is difficult for plaintiffs to win a rule of reason case. Given the existing hurdles, it makes no sense to raise the bar even higher to prove a rule of reason violation in markets involving two-sided platforms.

ARGUMENT

I. A PRIMA FACIE CASE DOES NOT REQUIRE SHOWING HARM TO BOTH SIDES OF A TWO-SIDED PLATFORM

"The rule of reason is designed and used to eliminate anticompetitive transactions from the market." *Leegin*, 551 U.S. at 898. All parties and the courts below agree that under the rule of reason, if plaintiffs

establish that a restraint is "*prima facie* anticompetitive," then the burden shifts to the defendant to show a "procompetitive justification." *California Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756, 771 (1999); *accord Fed. Trade Comm'n v. Actavis, Inc.*, 133 S. Ct. 2223, 2236 (2013) ("An antitrust defendant may show in the antitrust proceeding that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason.").

The law places the burden of establishing procompetitive benefits on the defendant largely because "[t]he defendant, being the author of the restraints, is in a better position to explain why they are profitable and in consumers' best interests." 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶1505, at 432 (4th ed. 2017); *see* U.S. Dept. of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 10 (2010) (*Horizontal Merger Guidelines*) (merging firms must substantiate efficiency claims because "much of the information relating to efficiencies is uniquely in the possession of the merging firms"); *see generally Int'l Broth. of Teamsters v. United States*, 431 U.S. 324, 359 n.45 (1977) ("Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof.").

The court of appeals essentially reversed the burden of proving procompetitive benefits. The court held that in a market involving a two-sided platform like credit cards, it was insufficient for plaintiffs merely to establish anticompetitive harm on one side of the platform. Rather, the court held that plaintiffs

must also *disprove* that *benefits* on the cardholder side equal or exceed those harms. According to the court, "Plaintiffs' initial burden was to show that the NDPs made *all* Amex consumers on both sides of the platform—*i.e.*, both merchants and cardholders—worse off overall." Pet. App. 51a; *id.* at 53a ("Without evidence of the net price affecting consumers on both sides of the platform, the District Court could not have properly concluded that a reduction in the merchant-discount fee would benefit the two-sided platform overall.").

The Second Circuit's "overall harm" requirement is without foundation.

A. An "Overall Harm" Requirement Is Not Legally Supportable

As an initial matter, the court of appeals' reasoning is flawed because the benefits the district court purportedly failed to take into account do not offset (or correspond to) all the harms that the district court found. That is, even if the benefits to *Amex* cardholders exactly offset the higher *Amex* merchant fees, there remains the disruption of the price-setting mechanism and channeling of competition away from the merchant side of the platform, which raises merchant fees on *all other* credit cards and harms *non-Amex* consumers and innovation. *See* U.S. Br. 40-43, 47, 49; Pet'rs Br. 41-46. The court's exclusive focus on the Amex platform was erroneous.[2]

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[2] The court of appeals criticized the district court's reliance on its (unchallenged) finding that *all* consumers that shop with merchants that accept Amex credit cards are harmed because higher merchant fees are passed on in the form of higher retail

In any event, there is no requirement that an antitrust plaintiff show net harm to *both* sides of a two-sided platform to establish a prima facie case. *See, e.g., Times-Picayune*, 345 U.S. 594 (harm to advertisers; no showing of harm to readers); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (same); *Realcomp II Ltd. v. Fed. Trade Comm'n*, 635 F.3d 815 (6th Cir. 2011) (anticompetitive harm to home sellers using multiple listing service; potential benefit to certain home buyers raised and rejected as a defense).

The court of appeals' holding to the contrary hinges on its conclusion that the relevant market must be defined to include both sides of a two-sided market. Pet. App. 49a ("District Court's erroneous market definition caused its anticompetitive effects analysis to come up short"). But that reasoning is doubly wrong. It is wrong because a relevant market may comprise of one side of a two-sided platform, as explained in part II. And it is wrong because it is well settled that proving anticompetitive harm directly, by showing actual detrimental effects, is an *alternative* to proving anticompetitive harm indirectly by showing market power in a relevant market. *See Fed. Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) ("Since the purpose of the inquiries into market definition and market power is to de-

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prices. According to the Second Circuit, this "fails to take into account the offsetting benefits to cardholders in the form of rewards and other services." Pet. App. 49a n.52. But this criticism is backwards. The most relevant anticompetitive harms and procompetitive benefits are *market-wide* effects, which the court of appeals ignored, not those specific to *Amex* cardholders or merchants.

termine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" (quoting 7 Phillip E. Areeda, *Antitrust Law* ¶ 1511, at 429 (1986))). Relying on a supposed market-definition flaw to defeat actual detrimental effects is bootstrapping. *Cf. Horizontal Merger Guidelines* § 4 ("Evidence of competitive effects can inform market definition . . . .").

B. An "Overall Harm" Requirement Is Not Supported by a Danger of "False Positives"

The Second Circuit's "overall harm" requirement is not justified by policy concerns over "false positives," to the extent such concerns are relevant. The court reasoned erroneously that "[s]eparating the two markets allows legitimate competitive activities in the [cardholder side of the] market for general purposes to be penalized no matter how output expanding such activities may be." Pet. App. 35a. But the district court's ruling does no such thing.

Assuming *arguendo* that increased benefits to Amex cardholders may properly be considered as offsetting "procompetitive benefits," rather than part of the distortion of the competitive process, separating the two markets means only that establishing anticompetitive harm on the merchant side shifts the burden to the defendant to establish those offsetting

benefits.[3] Amex does not and could not reasonably argue that the government was somehow in a better position to *disprove* offsetting benefits to Amex's cardholders than Amex was to prove such benefits. *Cf.* Herbert Hovenkamp, *The Rule of Reason*, Fla. L. Rev. (forthcoming 2018) (manuscript at 22), http://ssrn.com/abstract=2885916 ("To the extent that the defendants' expectation of profit came from something other than a restriction of competition, they should have evidence and are in the best position to provide it.").

Nor does the likelihood of *some* offsetting benefits logically imply that the burden should be on the plaintiffs to show overall harm in the first place. *See* Cert. Op. 24-25 (arguing that "[e]vidence about the

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[3] Given the distortion of the competitive process, the Solicitor General properly questions whether enhanced Amex cardholder rewards would be a legitimate procompetitive benefit even if higher merchant fees were completely passed on to Amex cardholders. *See* U.S. Br. at 41-42. At the same time, the Solicitor General proposes a rule that "legitimate procompetitive benefits in a closely related and interdependent market" should be considered at the second step of the rule of reason analysis if, but only if, the defendant shows that the challenged restraint is reasonably necessary to achieve those benefits. *Id.* at 52.

This Court has held that, as a general matter, anticompetitive harm in one market may not be offset by benefits that may accrue in other markets. *See, e.g., United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370 (1963). Since this case does not turn on whether an exception to the out-of-market benefits rule is appropriate, the Court need not reach the Solicitor General's proposal. To the extent the Court does address it, any exception to the out-of-market benefits rule under the rule of reason must be predicated on benefits to the competitive process and *consumers generally*.

NDPs' effect on merchant fees does not support a confident inference of harm to competition overall because such effects necessarily will [a]ffect cardholders"). Two-sided platforms typically involve "balancing the prices on two sides of the market." Pet. App. 9a (citation and internal quotation marks omitted). But a two-sided platform is not like a scale on which every weight on one side must be offset by an equal weight on the other side. On the contrary, price effects on one side are *not* perfect substitutes for price effects on the other; that is a defining characteristic of two-sided markets. *See* Dennis W. Carlton & Ralph A. Winter, *Vertical MFN's and the Credit Card No-surcharge Rule* 25-28, 34 n.41 (June 6, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2982115.

This case demonstrates the point. The Second Circuit recognized, as Amex conceded, "not all of Amex's gains from increased merchant fees are passed along to cardholders in the form of rewards." Pet. App. 51a. Accordingly, evidence of higher merchant fees *did* suggest a net harm to Amex merchants and cardholders, at least with sufficient confidence to shift the burden to Amex to show otherwise.[4]

In short, even accepting that offsetting benefits to Amex cardholders constitute a legitimate procom-

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[4] The Solicitor General correctly observes that the court of appeals did not question the district court's conclusion that the anti-steering rules increased Amex's two-sided price, but simply faulted plaintiffs for failing to calculate a reliable *measure* of its two-sided price U.S. Br. 48.

petitive benefit to place into the balance, applying the standard burden-shifting rules does not threaten to chill procompetitive conduct. On the contrary, as explained in part III, adopting the Second Circuit's "overall harm" requirement would create a substantial risk of "false negatives," thereby encouraging *anticompetitive* conduct.

C. Other Considerations Do Not Warrant Raising Plaintiffs' Burden of Production

That the restraint at issue is vertical rather than horizontal provides no basis for raising the burden on plaintiffs to demonstrate a prima facie case, particularly where, as here, the restraint restricts *interbrand* competition.

In *Leegin*, the Court stated that *intrabrand* resale price restraints were not necessarily anticompetitive because they might be accompanied by increased services, which would benefit *interbrand* competition. 551 U.S. at 895. But notwithstanding the potential procompetitive benefits, the "standard" rule of reason applied. *Id.* at 898; *see also McWane, Inc. v. Fed. Trade Comm'n*, 783 F.3d 814, 836 (11th Cir. 2015) (rejecting argument that, "given the high likelihood that an exclusive dealing arrangement is actually procompetitive, a plaintiff alleging illegal exclusive dealing must show 'clear evidence of anticompetitive effect'") (citation omitted). Amex's anti-steering restraints, although vertical in nature, restrict *interbrand* competition and thus cannot warrant more favorable treatment. On the contrary, *Leegin* suggests stricter scrutiny is appropriate for a vertical restraint on *interbrand* competition. Indeed, one of

the harms caused by the restraints—channeling competition to a high (merchant) price, high (cardholder) rewards equilibrium—is analogous to one of the "economic dangers" *Leegin* identified. 551 U.S. at 897 ("careful scrutiny" required when "'resale price maintenance spreads to cover the bulk of an industry's output, depriving consumers of a meaningful choice between high-service and low-price outlets'" (quoting F. Scherer & D. Ross, *Industrial Market Structure and Economic Performance* 558 (3d ed. 1990))) (brackets in original omitted).

Nor is it appropriate to raise plaintiffs' initial burden to show anticompetitive harm based on a court's *impression* that defendants have a legitimate procompetitive justification, which the defendant must establish at the second stage. *See* Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 Vand. L. Rev. 1, 48-50 (2016) (criticizing courts' nontransparent "conflation of pro- and anticompetitive effects at the initial stage [which] undermines the 'structure' claimed for burden-shifting and requires the balancing of incommensurate values in an implicit—and thus opaque—manner"); Hovenkamp, *Rule of Reason* at 20 ("[T]he prima facie case should focus on one question: does the restraint before the court require an explanation, or should the complaint be dismissed without further query?"). The court of appeals appears to have done just that.[5]

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[5] The Second Circuit appears to have accepted that Amex had legitimate procompetitive justifications beyond enhanced cardholder benefits. *See, e.g.*, Pet. App. 48a ("The NDPs prevent a merchant from seeking high-end clientele by advertising acceptance of Amex cards but then, at the critical point of sale, offering that clientele a discounted price for not using the Amex

II. A RELEVANT MARKET MAY COMPRISE ONE SIDE OF A TWO-SIDED PLATFORM

A. The Interdependence of Markets Does Not Warrant Abandoning Fundamental Legal and Economic Principles Governing Market Definition

The court of appeals acknowledged and Amex concedes that a relevant market is defined in terms of demand substitutability. Pet. App. 31a; Cert. Op. 15-16. That is, the "boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *Horizontal Merger Guidelines* § 4 ("Market definition focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service."). Services provided by credit card platforms to merchants and

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card. In this case, we see no monopolistic danger in this purpose. Amex has a legitimate interest in seeing that cardholders who take advantage of amenities offered to Amex cardholders simply by virtue of owning the card are not enticed to use their Visa or MasterCard by card-connected discounts from merchants."); *id.* (NDPs protect Amex's rewards program, prestige and decrease industry concentration); *see also id.* at 30a-31a & n.43. It was particularly inappropriate for the court to credit Amex's proffered procompetitive justifications, even if only implicitly, given that the district court *found* the procompetitive justifications insufficient, *see* Pet. App. 227a-258a (rejecting "preservation of business model" and free-rider justifications), and Amex did not challenge those findings on appeal. *See* U.S. Br. 54.

services provided to cardholders are not substitutes, as Amex readily acknowledges. Cert. Op. 16.

Nonetheless, the Second Circuit held that the "District Court erred in excluding the market for cardholders from its relevant market definition" "because the price charged to merchants necessarily affects cardholder demand, which in turn has a feedback effect on merchant demand (and thus influences the price charged to merchants)." Pet. App. 32a, 39a. That is a non-sequitur. The failure to consider feedback effects could erroneously lead to defining too narrow a relevant market.[6] But it is not a ground for including two, complementary sides of a platform in the same relevant market. *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 562e, at 102-03 (Supp. 2017) (the Second Circuit correctly concluded that "'feedback' effects are properly considered in delineating a market," but erred in including both sides of two-sided platform in a single relevant market); *cf. Microsoft*, 253 F.3d at 54, 60, 81 (explaining that "market share in the browser market affects market power in the operating system market," but browser market is "an entirely different market" because

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[6] For example, an analyst may find that a hypothetical credit-card monopolist could impose a small but significant, non-transitory increase in price (SSNIP) because the number of merchants that would switch to debit cards is small, taking into account only first-order effects. But the number might be greater insofar as attrition of merchants reduces consumers' demand for credit cards, which further reduces the demand by merchants, and so forth. The district court found that plaintiffs' expert had accounted for "the possibility that the SSNIP might result in cross-platform feedback effects." Pet. App. 126a.

browsers are not "reasonably interchangeable" with operating systems).[7]

Amex has argued that separate sides of a credit card platform cannot be in separate relevant markets because they are part of the same product, like matching left and right shoes. Cert. Op. 16. Of course left and right shoes are sold to the same customer and used by that customer for the same purpose, unlike the services provided to the separate sides of a credit card platform. In any event, even with respect to products sold to the same groups of consumers, this Court has "often found arrangements involving functionally linked products at least one of which is useless without the other" to involve "two separate product markets." *Jefferson Parish Hosp. District No. 2 v. Hyde*, 466 U.S. 2, 19 n.30, 21, 28 (1984) (holding that anesthesiology and surgical services sold to patients are in separate product markets notwithstanding that "[i]t is safe to assume that every patient

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[7] The Second Circuit was wrong to suggest that the district court "ignore[d] the two markets' interdependence" and "focus[ed] entirely on the interests of merchants while discounting the interests of cardholders." Pet. App. 35a, 54a. Although the district court defined the relevant market as network services provided to merchants, the court stressed throughout its thorough opinion that the interrelatedness of the merchant and cardholder markets must be considered. *See, e.g.*, Pet. App. 70a ("deeply interrelated"); 79a ("symbiotic relationship"); 81a ("due consideration must be given to competitive dynamics on the other side"); 118a ("markets are inextricably interlinked"); 119a ("the court recognizes and accounts for the fact that such conduct may indirectly affect competition at another level within the GPCC platform"); 121a ("court must account for the two-sided features of the credit card industry in its market definition inquiry, as well as elsewhere in its antitrust analysis").

undergoing a surgical operation needs the services of an anesthesiologist"); *accord Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 463 (1992) (parts and service in separate markets even if "there is no demand for parts separate from service").

And when functionally linked products involve *different* services sold to *different* groups at *different* prices in competition with *different* rivals, they are necessarily in different relevant markets. *Cf. Brown Shoe*, 370 U.S. at 325 ("practical indicia" of relevant "submarket" include "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors").

B. Case Law Supports Applying Standard Market Definition Rules to Two-Sided Platforms

Times-Picayune strongly militates against exempting two-sided platforms from the well-established law on market definition.[8] The district

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[8] The Second Circuit's adoption of an exception to the basic rules of market definition and burdens of proof to account for the importance of feedback effects in two-sided markets is akin to the Seventh Circuit's creation of a single-entity defense for sports leagues to accommodate the need for teams to cooperate—which this Court emphatically rejected. *See American Needle, Inc. v. National Football League*, 560 U.S. 183, 199 & n.6 (2010) (holding that "necessity of cooperation" is a factor relevant to the rule of reason analysis, but it "is not relevant to whether that cooperation is concerted or independent action").

court in *Times-Picayune* had ruled that the defendant newspaper unlawfully tied sales of advertising in its morning paper to the purchase of advertising in its evening paper, based largely on the morning paper's dominance in circulation. *See United States v. Times-Picayune Pub'g Co.*, 105 F. Supp. 670, 674 (E.D. La. 1952). This Court reversed because the district court erroneously *conflated* the subscriber and advertiser sides of the newspaper market.

The Court observed:

> The District Court found that the Times-Picayune occupied a "dominant position" in New Orleans; the sole morning daily in the area, it led its competitors in circulation, number of pages and advertising linage. *But every newspaper is a dual trader in separate though interdependent markets*; it sells the paper's news and advertising content to its readers; in effect that readership is in turn sold to the buyers of advertising space. *This case concerns solely one of these markets.*

Times-Picayune, 345 U.S. at 610 (emphasis added). The Court reversed the district court's liability determination because the morning paper was not dominant in the *newspaper advertising* market, and the morning and evening newspapers were not separate products *in the eyes of advertisers*.[9] *Id.* at 611-13.

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[9] Notably, the Court stressed that the defendant's dominance must be determined by reference to "the *whole* and not part of a relevant market," *Times-Picayune*, 345 U.S. at 611 (emphasis

Quite obviously, the two interdependent markets (advertising and subscriptions) involved separate products, as here. *Cf. Jefferson Parrish*, 466 U.S. at 18, 29 (where vertical restraint affected both patient and anesthesiologist sides of hospital services market, Court held that those effects should be analyzed separately).

Amex has sought to distinguish *Times-Picayune* by arguing that credit cards are different from newspapers because, unlike newspaper subscriptions and newspaper advertising, credit-card services offered by Amex to cardholders and merchants are consumed in "fixed proportions." Cert. Op. 18. This premise is dubious. *See, e.g.*, Pet. App. 250a-254a (discussing Amex's free-rider argument based on services it provides other than facilitating transactions with cardholders). In any event, products used in "fixed proportions" are not necessarily in the same product market, even when sold to the same group of customers, as the Court's tying cases demonstrate. *See, e.g., Jefferson Parrish*, 466 U.S. at 28 n.47; *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 667 (1944) (tying patented heating system and unpatented stoker switch unlawful; "it makes no difference that the unpatented device is part of the patented whole"); *see also Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n*, 666 F.2d 1130, 1141-42 (8th Cir. 1981) (finding that a cemetery lot and the preparation of the foundation for grave memorials are two separate products).

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added), by which the Court was referring to only the advertising market.

Amex also sought to distinguish *Times Picayune* on the ground that it involved exclusion, whereas the restraints here do not exclude competing credit card networks. Cert. Op. 19. In fact, however, the district court found that the anti-steering restraints *did* have an exclusionary effect by restricting competition from competing credit cards as well as entry of new business models. *See* Pet. App. 203a-207a, 212a-214a. In any event, the rule that product markets are defined by interchangeability of use and demand substitution factors does not change depending on whether exclusion, collusion, or mergers are at issue.

To be sure, this Court has recognized "cluster" markets, in which complementary products are sometimes combined to analyze the competitive effects of challenged conduct. *See United States v. Grinnell Corp.*, 384 U.S. 563, 571-73 (1966); *Philadelphia Nat'l Bank*, 374 U.S. at 356. A cluster market is appropriate in one of two circumstances, neither of which is applicable here. A cluster market may be used for administrative convenience—where the market conditions are similar for the products at issue. *See Promedica Health System, Inc. v. Fed. Trade Comm'n*, 749 F.3d 559, 565 (6th Cir. 2014). Or it must be used to account for the fact that the cost of offering a bundle of complementary products *to the same group of consumers* is lower than offering the products separately such that providers of the separate products do not constrain providers of the bundle. *See id.* at 567; 2B Phillip E. Areeda, Herbert Hovenkamp, & John Solow, *Antitrust Law* ¶ 565c, at 433-34 (4th ed. 2014). Neither rationale is inconsistent with defining markets in accordance with demand-substitution principles.

III. RAISING THE BURDEN ON PLAINTIFFS TO MAKE OUT A PRIMA FACIE CASE WOULD HARM COMPETITION

Upholding the Second Circuit's special rules for defining markets and allocating the burden of proof in markets involving two-sided platforms would have far-reaching implications. All sides agree: "'Two-sided platforms are increasingly common' as 'modern technologies have led to rapid growth in the number, size, and importance of such firms.' Today, some of the most innovative firms and industries now consist of platforms that have some two-sided characteristics—including search engines, ride-sharing, e-commerce, rental exchanges, and electronic payments." Cert. Op. 30-31 (quoting cert amicus brief of 25 law professors) (brackets omitted).

At the same time, the economics of internet platforms often lead successful firms to dominate their markets because of significant barriers to entry from network effects, among other things. *See* Stanley M. Besen & Joseph Farrell, *Choosing How to Compete: Strategies and Tactics in Standardization*, 8 J. Econ. Perspectives 117, 122 (1994) ("[N]etwork markets tend to display inertia—that is, once a technology is known to have a substantial lead in its installed base, it is difficult for it to be displaced even by a technically superior and cheaper alternative."); Howard A. Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161 U. Pa. L. Rev. 1663, 1676-84 (2013) (citing potential amplification of market power of digital platforms resulting from informational advantages, network effects, and switching costs).

In this vast swath of commerce, the Second Circuit's rules would raise the burden of proving a rule of reason violation, thereby discouraging some meritorious claims and encouraging anticompetitive conduct. *See* Andrew I. Gavil, *Burden of Proof in U.S. Antitrust Law*, *in* 1 *Issues in Competition Law and Policy* 125, 130-31 (ABA Section of Antitrust Law 2008) (noting risk of "significant instances of false negatives" in antitrust cases resulting from excessive information demands on plaintiffs). In fact, under the court of appeals' logic, a dominant platform operator could exclude rivals for the *sole purpose* of raising prices on one side of the market, but because this enables the dominant firm to increase benefits to some limited number of consumers on the other side of the platform, plaintiffs would have to prove that "net" prices have been elevated in order to establish a prima facie case. Or a consortium of internet firms could agree to a privacy standard that adversely affects consumers, but any rule of reason claim would have to show, as a threshold matter, that the harm to consumers was not outweighed by benefits to advertisers.

More ominously, the appeals court's reasoning calls into question the applicability of the *per se* rule against price fixing to markets involving two-sided platforms. This Court has said that the *per se* rule is appropriate only for restraints "'that would always or almost always tend to restrict competition and decrease output.'" *Leegin*, 551 U.S. at 886 (quoting *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)). But defendants could always argue, as Amex does here, that collusion to generate higher

prices on the restrained side of the market "does not support a confident inference of harm to competition overall, because such effects necessarily will [a]ffect" the other side. Cert. Op. 24-25.

The Second Circuit's rules also would add undue complexity and cost to already complicated and lengthy litigation under the rule of reason. It is a commonplace that "litigating a rule of reason case is 'one of the most costly procedures in antitrust practice.'" *Leegin*, 551 U.S. at 917 (Breyer, J., dissenting) (quoting Herbert Hovenkamp, *The Antitrust Enterprise* 105 (2005)). "The elaborate inquiry into the reasonableness of a challenged business practice entails significant costs. Litigation of the effect or purpose of a practice often is extensive and complex." *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 343 (1982); *accord Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015). The four economic expert witnesses, 30 fact witnesses, 7,000 pages of testimony, and 1,000 exhibits introduced during the seven-week trial of this case exemplify those high costs. *See* Pet. App. 72a.

Requiring both sides of a two-sided platform to be combined raises those costs and a host of uncertainties. For example, how are separate sides of the platform, involving different services sold to different groups, to be combined and under what common metric? And if the price on one side of the platform is negative, how is that price to be calculated? The Second Circuit insisted that a "two-sided price" be shown, but Amex attempted such a showing and the district court found it unreliable. Pet. App. 182a-184a (questioning Amex's expert's "discount" on the mer-

chant side for payments made to merchants to market co-branded cards as well as his methods for accounting for cardholder benefits).[10]

Even without the Second Circuit's new rules, "it is very difficult for a plaintiff (either the government or a private party) to win a rule of reason case." Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a* Per Se *Rule Against Vertical Price Fixing*, 71 Geo. L. J. 1487, 1489 (1983). It was difficult in the early 1980s, and the level of difficulty has only increased since then. *See* Hovenkamp, *Rule of Reason* at 16 ("The requirements for a rule of reason case—market power and anticompetitive effects—can be very difficult to prove."); Allensworth at 48-49 (review of cases indicates that judges "seek out rules and doctrines that make it especially difficult for the plaintiff to carry its initial burden"). Indeed, Professor Carrier's surveys found that from 1977-2009, plaintiffs won few rule of reason cases to reach a judgment. *See* Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 B.Y.U. L. Rev. 1265; Michael A. Carrier, *The Rule of Reason: An Empirical*

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[10] The unreliability finding was not questioned by the court of appeals nor challenged as clearly erroneous by Amex. Notably, the court of appeals demonstrated its own confusion over the proper measure of a two-sided price by suggesting that the "price" should essentially be a measure of Amex's profits. *See* Pet. App. 51a (acknowledging that Amex's higher merchant fees were not completely offset by higher rewards, but finding it insufficient to show net harm because it "says nothing about other expenses that Amex faces, let alone whether its profit margin is abnormally high.").

Update for the 21st Century, 16 Geo. Mason L. Rev. 827 (2009).[11]

Given the existing hurdles, it makes no sense to raise the bar to proving a rule of reason violation even higher in markets involving two-sided platforms. *See, e.g.*, *Leegin*, 551 U.S. at 897 (rule of reason must be applied "diligent[ly] in eliminating . . . anticompetitive uses from the market").

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[11] To be sure, Professor Carrier's surveys do not take into account settlements, which have been notable in the credit card industry. Judge Ginsburg also found very low success rates for reported cases challenging vertical non-price restraints following the Court's adoption of the rule of reason in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). *See* Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 Antitrust L.J. 67 (1991); *see also* Theodore Voorhees, Jr., *Reasoning Through the Rule of Reason for RPM, Antitrust*, Fall 2013, 58, 60 (noting paucity of resale price maintenance cases after *Leegin*'s adoption of rule of reason).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

RICHARD M. BRUNELL
Counsel of Record
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 600-9640
rbrunell@antitrustinstitute.org

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In the Supreme Court of the United States

STATE OF OHIO, ET AL.,
Petitioners,

v.

AMERICAN EXPRESS COMPANY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* THE AMERICAN MEDICAL ASSOCIATION AND OHIO STATE MEDICAL ASSOCIATION IN SUPPORT OF PETITIONERS

MATTHEW L. CANTOR
Counsel of Record
JEFFREY I. SHINDER
ANKUR KAPOOR
JAMES J. KOVACS
CONSTANTINE CANNON LLP
335 Madison Ave.
New York, NY 10017
(212) 350-2700
mcantor@constantinecannon.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTERESTS OF *AMICI*[1]

The American Medical Association (AMA) is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all U.S. physicians, residents, and medical students are represented in the AMA's policymaking process. AMA members practice and reside in all states and in the District of Columbia. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health.

The Ohio State Medical Association (OSMA) was founded in 1846, initially as the Ohio State Medical Society, to "foster legislation and activities which would safeguard the interests of the public . . . and elevate the standards of the medical profession." The OSMA's purpose remains undiluted over 170 years later, and is advanced by courageous and conscientious Ohio physicians who are devoted to providing the best practicable and affordable medical care possible.

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[1] No party's counsel authored this brief in whole or in part. No party or its counsel contributed money to fund preparing or submitting this brief. No person—other than the AMA and the OSMA, their members, or their counsel—contributed money to fund preparing or submitting this brief. Consents from all relevant parties to the filing of briefs by *amici curiae* have been granted.

The AMA and OSMA join this brief on their own behalves and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

The *amici* and their members have an interest in ensuring that physicians can deliver high-quality, affordable care to their patients. The *amici* are concerned that dominant healthcare entities may adopt anticompetitive, anti-referral rules that are antithetical to the delivery of high-quality and, indeed, necessary medical care in the United States. The *amici* and their members contend that the Second Circuit decision's departure from well-established antitrust precepts that concern "two sided" platforms, if not reversed by this Court, will make it more likely that anti-referral rules that are imposed upon physicians by dominant entities and which, in turn, harm the quality of healthcare delivery, will be immunized from antitrust scrutiny. Moreover, the *amici* and their members contend that the deterrent effect of antitrust law to prohibit these anticompetitive practices will be severely compromised if the Second Circuit decision is not reversed.

To assure that anticompetitive restraints do not improperly restrict physician medical judgment and, thus, the quality of healthcare services, the Court should reverse.

SUMMARY OF ARGUMENT

The district court found, after a full, seven week bench trial, that anti-steering provisions that American Express imposed in its contracts with merchants, and which precluded merchants from requesting payments cards other than American Express when American Express cards were presented, violated the Sherman Act § 1, 15 U.S.C. § 1. *United States v. Am. Express Co.*, 838 F.3d 179, 184 (2d Cir. 2016) (citing 88 F. Supp. 3d 143 (E.D.N.Y. 2015)). The Second Circuit did not disturb the district court's factual findings that those provisions eliminated horizontal inter-brand competition for merchants, raising prices and stifling innovations in payment-card network services. Nonetheless, the Second Circuit reversed the district court and ordered judgment in favor of American Express.

The Second Circuit grounded its holding in the notion that electronic-payments networks compete through supplying "two-sided" platforms—*i.e.*, platforms that have a merchant "side" and a cardholder "side." The Second Circuit held that, when confronted with the question of whether a two-sided platform has engaged in anticompetitive conduct, a court must evaluate market power and anticompetitive impact by defining a relevant market that encompasses both sides of the platform. *See Am. Express*, 838 F.3d at 196, 200 (holding that the district court's market definition was "fatal to its conclusion" because the district court "expressly declined 'to define the relevant product market to encompass the entire multi-sided platform.'") Specifically, the Second Circuit held that, in order to for a plaintiff to make a *prima facie* case of

anticompetitive impact under the Rule of Reason in a case concerning network platforms, a plaintiff must show that the alleged restraint caused harm on a "net" basis across both sets of platform users. *Id.* at 183 (holding that "[w]ithout evidence of the [anti-steering rules'] net effect on both merchants and cardholders," there could be no restraint of trade). For the reasons discussed by Petitioners and other *amici curiae* in support of Petitioners, the Second Circuit's holding is contrary to well-established law, including decisions of this Court, and would, in many cases, create administrative burdens upon litigants and courts that would be nearly impossible to meet. *See e.g.*, Brief for the Petitioners and Respondents Nebraska, Tennessee, and Texas and Brief for the United States as Respondent Supporting Petitioners.

The AMA and the OSMA submit this brief to demonstrate how the ability of the antitrust laws to discipline anticompetitive behavior in healthcare markets, and to help spur best medical outcomes, could be significantly and negatively compromised if the Second Circuit decision survives. For example, dominant healthcare "platforms," such as health-insurer networks, compete on "two sides," inasmuch as they supply services to (i) a market for medical services provided to patients that are purchased by health insurance plans on one side of the platform and (ii) an inter-related, but distinct, market of commercial health insurance policy sales to subscribers on the other side of the platform.[2]

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[2] Studies have found that health insurance markets are highly concentrated in many geographic areas within the United States. *See e.g.*, AMA, *Competition in Health Insurance: A Comprehensive*

Such dominant health insurance networks (or their agent benefit managers) have imposed and could further impose rules or effectively erect barriers that prohibit physicians from referring patients to certain specialists, particularly out-of-network specialists, for innovative and even necessary medical tests. Notwithstanding such restraints' material interference with physician judgment and harm to patient care, under the Second Circuit's ruling below, governmental, patient, or physician plaintiffs could not make a *prima facie* case that the restraint was anticompetitive unless they were able to demonstrate that the restraint caused a "net" harm to both the medical services and commercial insurance markets. Under the Second Circuit's decision, an antitrust plaintiff challenging those restraints would face the exceedingly difficult, if not impossible, burden of quantifying both the harm to patient care and harm to commercial insurance subscribers—and then netting out the latter from the former.

Under a century of precedent applying the Rule of Reason—the most searching mode of analysis applied under antitrust law—the plaintiff bears the initial burden to show that a challenged practice adversely affects competition and consumers in a relevant

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Study of U.S. Markets, 2017 Update. This study from the American Medical Association indicates that "[s]ixty-nine percent of MSA-level health insurance markets in the U.S. are highly concentrated, based on guidelines used by the Department of Justice and Federal Trade Commission). *See also* American Hospital Association, *Study: Most health insurance markets are highly concentrated* (Sept. 8, 2015), http://news.aha.org/article/150908-study-most-health-insurance-markets-highly-concentrated.

market; and the practice's effects in another relevant market on some other distinct set of entities are irrelevant to this initial inquiry. This well-settled approach provides an administratively feasible way for physicians and patients to challenge restraints that are likely to materially interfere with the physician's judgment and potentially cause patient harm. The AMA and the OSMA submit that antitrust law's ability to discipline anticompetitive practices that harm patient care will be significantly eroded if the Second Circuit's "net harm" approach becomes the standard that plaintiffs must satisfy to make a *prima facie* Rule of Reason case against network platforms. This Court should reverse.

BACKGROUND

The duty of physicians to provide best medical care to their patients is paramount. AMA, Preamble, AMA Principles of Medical Ethics, https://www.ama-assn.org/delivering-care/ama-principles-medical-ethics (last visited Dec. 7, 2017) ("As a member of this profession, a physician must recognize responsibility to patients first and foremost, as well as to society, to other health professionals, and to self."). Physicians are, indeed, ethically obligated to provide the best practicable medical care to their patients. AMA Code of Medical Ethics Opinion 1.1.6, https://www.ama-assn.org/delivering-care/quality (last visited Dec. 7, 2017) ("Individually and collectively, physicians should actively engage in efforts to improve the quality of health care by: (a) Keeping current with best care practices and maintaining professional competence...").

> The practice of medicine, and its embodiment in the clinical encounter between a patient and a

> physician, is fundamentally a moral activity that arises from the imperative to care for patients and to alleviate suffering. The relationship between a patient and a physician is based on trust, which gives rise to physicians' ethical responsibility to place patients' welfare above the physician's own self-interest or obligations to others, to use sound medical judgment on patients' behalf, and to advocate for their patients' welfare.

AMA, Code of Medical Ethics Opinion 1.1.1, https://www.ama-assn.org/delivering-care/patient-physician-relationships (last visited Dec. 7, 2017). Accordingly, physicians must make sure that restrictions are not placed upon them that materially compromise their primary duty: to ensure that the patient is provided with quality medical care.

Physicians often contract with health insurers that operate two-sided platforms. Physicians contract with health insurers to supply medical services to the health-insurer members as part of healthcare provider networks that health insurers assemble. Health-insurance plans, in turn, contract with physicians and other healthcare providers to form provider networks that will assure that the health insurers' members can access necessary and quality medical services at certain negotiated rates. *See e.g.*, 1996 Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Healthcare ("DOJ/FTC Health Care Statements") No. 8, at 81 (Aug. 1996) (physician joint ventures and groups "contract with [health] plans to provide physician services to plan subscribers at predetermined prices"),

https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf.

Health insurers also provide network services to employers and individuals that purchase health insurance policies from them--policies that cover certain of the medical expenses that these employers or individuals would otherwise incur. *Saint Alphonsus Med. Ctr. - Nampa, Inc. v. Saint Luke's Health Sys.*, 778 F.3d 775, 784 (9th Cir. 2015) (quoting Gregory S. Vistnes, *Hospitals, Mergers and Two Stage Competition*, 67 Antitrust L.J. 671, 672 (2000)) (in case concerning the acquisition of a primary-care physician group, it is held that "the vast majority of health care consumers are not direct purchasers of health care—the consumers purchase health insurance and the insurance companies negotiate directly with the providers"). Health insurers compete to sell insurance products to employers and individuals: such competition is predicated on the premiums charged, benefits offered, and medical networks assembled by the health insurers. Physician contracts with insurance (or benefit-manager) networks sometimes preclude, either effectively or via contract, referrals to particular providers, particularly providers that are out-of-network and provide novel or innovative treatments. *See e.g.*, *Palmyra Park Hosp., Inc. v. Phoebe Putney Mem'l Hosp.*, 604 F.3d 1291, 1303 (11th Cir. 2010) (affirming denial of motion to dismiss and finding that providers excluded from insurer network suffered antitrust injury as exclusion led to fewer choices for patients). *See also New York v. Actavis PLC*, 787 F.3d 638, 659 (2d Cir. 2015) (indicating that anticompetitive

harm to healthcare consumers includes deterioration of "medically significant innovation").

These anti-referral provisions or barriers, if substantially restrictive and imposed by entities with substantial market power, may limit physician ability to make referrals that would otherwise be guided by the physician's best judgment and would lead to best medical outcomes. In this way, these restrictions could be wholly at odds with the physician's ethical responsibilities.[3] And because such restrictions could limit quality and choice, they raise competitive concerns that the antitrust laws traditionally have proscribed.

ARGUMENT

A. Healthcare services operate on networks or "platforms" with two sets of distinct users transacting in different markets.

As discussed, physicians and health care providers supply medical services that are purchased by health insurers for the benefit of their members. Providers compete on this side of the health insurer platform against one another by supplying superior services and competitive pricing to be included in the health insurer networks. They do not compete against insurers that supply policies to employers or individuals that seek to have their medical expenses covered. In this way, antitrust law has historically recognized that physicians participate in relevant markets for the

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[3] Hospitals may also adopt anti-referral rules that preclude physicians from referring cases in a manner that would be consistent with best medical judgment.

supply of medical services to health insurance plans that are separate and apart from markets for commercial insurance that are sold to employer and individual subscribers. For example, the section of the DOJ/FTC Health Care Statement No. 8 which concerns defining markets when applying the Rule of Reason, states that:

> if two hospitals formed a multiprovider network with their medical and other health care professional staffs, the Agencies would consider potential competitive effects in ***each*** market affected by the network, including, but not necessarily limited to, the markets for inpatient hospital services, outpatient services, each physician health care service provided by network members, and health insurance/ financing markets whose participants may deal with the network and its various types of health care providers.

Id. at 114-115 (emphasis supplied). *See also FTC v. Advocate Health Care Network*, 841 F.3d 460, 465 (7th Cir. 2016) (holding that markets exist for hospital services sold to health insurance plans); *accord St. Luke's Health Sys.*, 778 F.3d at 784.

On the subscriber side of the platform: the Antitrust Division recently and successfully preliminarily enjoined two health-insurer transactions —the acquisition of Humana by Aetna and the acquisition of Cigna by Anthem. In each case, the district court held that the relevant markets were those for the sale of commercial health insurance to employers and/or individuals, and analyzed the impact of the merger in the context of the relevant market for

the sale of commercial insurance to employers and/or individuals. The courts did not find that physicians or other health providers participated in these markets. *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 179-80 (D.D.C. 2017) (finding that a relevant market for administrative, self-insured network products existed for "employers" who "have a unique set of characteristics and needs that drive their purchasing processes and decisions"), *aff'd*, *United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir. 2017); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 8 (D.D.C 2017) (finding that the companies "compete head-to-head" in sale of health insurance to direct consumers).

The Second Circuit decision below conflates markets for the purchase of payment-card network services by merchants with markets for the use of payment-card network services by issuers and their cardholders. *Am. Express*, 838 F.3d. at 200 (reversing district court because it "expressly declined 'to define the relevant product market to encompass the entire multi-sided platform.'"). If that decision stands and is interpreted to apply to an analysis of healthcare platforms, it would be contrary to substantial precedent and would likely raise confusion concerning the appropriate scope of healthcare platform markets and how competition in them should be evaluated under the Rule of Reason. This should not occur.

B. The Second Circuit decision may wrongly require a plaintiff, in a healthcare platform case, to show net harm in order to establish a *prima facie case* under the Rule of Reason.

The district court below found, after a full bench trial, that American Express unreasonably restrained trade in violation of the Sherman Act § 1, 15 U.S.C. § 1, by forcing merchants to accede to anti-steering provisions that barred them from "(1) offering customers any discounts or nonmonetary incentives to use credit cards less costly for merchants to accept, (2) expressing preferences for any card, or (3) disclosing information about the costs of different cards to merchants who accept them." *Am. Express*, 838 F.3d at 184. Notwithstanding the undisputed fact that these anti-steering rules stifled horizontal competition, the Second Circuit reversed the district court. In so doing, the Second Circuit held "that without evidence of the [anti-steering rules'] net effect on both merchants and cardholders," there could be no restraint of trade. 838 F.3d at 183. The Second Circuit further held that the plaintiffs "bore the initial burden" to show net harm to competition on to two distinct set of customers, merchants and cardholders.

This Court has consistently rejected the Second Circuit's notion that the anticompetitive harm suffered by one distinct set of consumers in a relevant market can be offset by benefits to another distinct set of consumers in another market. *See, e.g.*, *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972) ("[T]he freedom guaranteed each and every business, no matter how small, is the freedom to compete . . . .

Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy"); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370 (1963) ("If anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating [the Clayton Act § 7], embark on a series of mergers that would make it in the end as large as an industry leader"). This Court has also evaluated platform industries, and found anticompetitive effects on one side of the platform without engaging in the "net harm" analysis mandated by the Second Circuit. *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594 (1953). For this reason, the Second Circuit decision should be reversed.

In any event, as the Petitioning States and United States have argued, a Rule of Reason plaintiff, in order to make a *prima facie* case, must merely demonstrate that the challenged restrain caused an anticompetitive impact. *See e.g.,* Brief of the United States at 44-47. No precedent requires such a plaintiff in a healthcare platform matter to net out any procompetitive impacts that the challenged restraint may have caused—whether those benefits occurred inside or outside the market at issue—to sustain such a *prima facie* case. If anything, the burden of proving whether procompetitive benefits offset the restraint's anticompetitive effects falls upon the platform defendant *after* the plaintiff has carried its initial burden. *Id.* Affirmance of this decision would therefore be contrary to existing law and potentially

impose new and extremely difficult burdens on a plaintiff challenging health care platform restrictions under the Rule of Reason.

If this Court adopts the Second Circuit's framework, it may require a government, physician, or patient plaintiff to show competitive harm in healthcare by netting out harm to one group of consumers with potential benefits to another group. For example, dominant health insurers could impose anti-referral rules prohibiting physicians from referring patients to out-of-network specialists for innovative or medically-necessary tests that would enhance the patient's care. Such practices can constitute anticompetitive harm. *See e.g.*, *Medscan LLC v. New York Univ. School of Med.*, 430 F. Supp. 2d 140, 147 (S.D.N.Y. 2006) (plaintiff alleging that quality of diagnostic imaging services were reduced as a result of exclusionary conduct stated an antitrust claim). *See also New York v. Actavis PLC*, 787 F.3d 638, 659 (2d Cir. 2015) (indicating that anticompetitive harm to healthcare consumers includes deterioration of "medically significant innovation."); *Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program* § 1, 76 Fed. Reg. 67026 (Oct. 28, 2011) ("The Agencies recognize that . . . under certain conditions ACOs could reduce competition. . . through . . . lower quality of care.").[4] Under *American*

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[4] While this brief focuses on the actions of health insurers, the concerns that the AMA has regarding anti-referral rules equally apply to such rules when imposed by dominant hospital systems. Such systems, as a condition of offering privileges to the physician, could preclude that physician from referring business away from

Express, to make out a *prima facie* case challenging such anti-referral rules or practices under the Rule of Reason, an antitrust plaintiff may have to: (1) prove harm to patients who are prevented from seeing a particular specialist or undergoing a particular test; and then (2) balance that harm against the speculative benefits obtained by other participants in the network, particularly the benefit to other patients and insurance subscribers; and then (3) net out (2) from (1). The Second Circuit's rule could thus allow anti-referral rules that harmed patient care to withstand antitrust scrutiny because it would be exceedingly difficult for an antitrust plaintiff to meet this standard.

If this Court affirms, it would provide greater leeway for dominant entities to impose contractual restraints on a physician's ability to refer their patients for care which the physician deems best in their medical judgment. Physicians will have no choice but to accept those restraints, because rejecting them means turning away a large number of patients whom physicians would otherwise be able to serve—which is untenable from both a business and ethical standpoint. Physicians would then have to weigh, against what they deem best for their patients, the consequences of their breaching their contractual obligations. It would be difficult for them to find recourse under the antitrust laws in such situations.

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the hospital even when such referral would be in the interest of the patient. Such anti-referral policies would, in this sense, reduce the quality of medical services and thus are anticompetitive.

Material interference with physicians' medical judgments threatens physician autonomy, damages the doctor-patient relationship, decreases medical innovation, and lowers the overall quality of patient care. The antitrust laws have historically played an instrumental role in preventing such outcomes. This Court should ensure that antitrust law's vital role in health care continues by reversing the Second Circuit's decision.

CONCLUSION

Because the Second Circuit's decision below would undermine antitrust enforcement in healthcare, harm patient care, and enable interference with physicians' duty to their patients to provide the best medical care, this Court should reverse.

Respectfully submitted,

MATTHEW L. CANTOR
Counsel of Record
JEFFREY I. SHINDER
ANKUR KAPOOR
JAMES J. KOVACS
CONSTANTINE CANNON LLP
335 Madison Ave.
New York, NY 10017
(212) 350-2700
mcantor@constantinecannon.com

Counsel for Amici Curiae

No. 16-1454

IN THE

Supreme Court of the United States

STATE OF OHIO, *et al.*,

Petitioners,

—v.—

AMERICAN EXPRESS COMPANY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICI CURIAE* ANTITRUST LAW & ECONOMICS SCHOLARS IN SUPPORT OF RESPONDENTS

JONATHAN M. JACOBSON
Counsel of Record
DANIEL P. WEICK
WILSON SONSINI GOODRICH & ROSATI, P.C.
1301 Avenue of the Americas, 40th Floor
New York, New York 10019
(212) 999-5800
jjacobson@wsgr.com
dweick@wsgr.com

ELYSE DORSEY
WILSON SONSINI GOODRICH & ROSATI, P.C.
1700 K Street, N.W., Fifth Floor
Washington, D.C. 20006
(202) 973-8800
edorsey@wsgr.com

Attorneys for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are fifteen scholars of antitrust, law, and economics at leading universities and research institutions across the United States. Their names, titles, and academic affiliations are listed in Appendix A. They have an interest in the proper development of antitrust jurisprudence and believe the Court has a valuable opportunity here to clarify the rule of reason's application in cases under Sherman Act Section 1, 15 U.S.C. § 1, by affirming the Second Circuit's holding that analysis of both sides of the two-sided market and a demonstration of market power are required to establish harm to competition in vertical restraints cases where the defendant is a two-sided platform. *Amici* are concerned that reversing the Second Circuit and adopting the Government's approach to rule of reason analysis would undermine the goals of the antitrust laws. Specifically, it would institutionalize a nebulous legal framework, untethered from sound economics, depriving defendants of valuable clarity as to what evidence a court might consider

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person other than the *amici* and their counsel made a financial contribution for the preparation or submission of this brief. All parties have filed blanket consents to the filing of amicus briefs.

persuasive or sufficient in any given case. And it would harm consumers by leading lower courts to erroneous decisions that condemn procompetitive conduct, thereby frustrating basic antitrust objectives.

SUMMARY OF ARGUMENT

While the three-step burden-shifting framework for evaluating antitrust cases under the rule of reason is conceptually well-accepted and understood, case law remains unclear regarding what suffices to satisfy each party's burden at each of the three stages. This case offers the Court an opportunity both to clarify what constitutes harm to competition and to explain the nature of the shifting burdens in rule of reason analysis.

In their merits briefing, rather than offer tools for providing structure to the rule of reason, Petitioners urge the Court to adopt an amorphous standard that would permit plaintiffs to satisfy their burden without evidence of durable market power—and even without direct proof of anticompetitive effects as the term is traditionally and properly understood in Section 1 jurisprudence. Acquiescing to Petitioners' vague conception of a plaintiff's *prima facie* burden would untether antitrust law from rigorous economic analysis and harm consumers by increasing significantly the risk of error in lower courts. This would leave litigants with little to no

certainty regarding what evidence they should introduce, let alone what evidence a court would find persuasive in any given case, and no clarity as to what businesses can and cannot do.

Without an approach to establishing plaintiff's burden disciplined by economic analysis and proof, the balance of false positive (Type I) and false negative (Type II) errors—which is critical to proper adjudication of the antitrust laws—would be thrown off keel. The fundamental goal of antitrust law is to foster consumer welfare by enhancing or increasing output in a relevant market. Output is the touchstone of antitrust analysis because a dominant firm's ability to constrain market-wide output is what allows it to anticompetitively raise prices and harm consumers. Petitioners' approach, however, would flip this analysis on its head and allow price effects to dictate results, thereby permitting courts to *ignore* output effects—the *sine qua non* of antitrust analysis—in ascertaining whether a plaintiff satisfied its *prima facie* burden.

Such a result is contrary to this Court's precedent and particularly problematic here. This Court has recognized that vertical restraints might "[increase prices] in the course of promoting procompetitive effects." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 895-96 (2007) (citing *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485

U.S. 717, 728 (1988)). And modern economics provides no basis for assuming that a demonstration of price effects on only one side of a two-sided market accurately represents the market-wide effects of a course of conduct. Rather, economics predicts that market-wide welfare might increase, decrease, or remain neutral given price effects on a single side. Only an analysis of the market as a whole can illuminate the true competitive implications.

This brief explains *amici*'s understanding of the relevant economic analysis. It explains why basic economic principles underlying the analysis of multi-sided markets lead to the conclusion that a plaintiff should be required to demonstrate, at a minimum, that: (1) the allegedly unlawful restraint caused anticompetitive effects in the form of actual or probable restricted *output* market-wide—a showing that logically requires analyzing both sides of a two-sided market; and (2) the defendant had sufficient market power to restrict output in a properly defined market. These two requirements align with sound economics and would also provide clear guidance for courts in applying the rule of reason.

ARGUMENT

I. ECONOMIC ANALYSIS OF TWO-SIDED PLATFORMS DEMONSTRATES THAT ANALYZING MARKET-WIDE OUTPUT IS CRITICAL TO UNDERSTANDING THE COMPETITIVE EFFECTS OF PLATFORM BEHAVIOR

"Output" refers to the amount of a good or service produced, and has long been a critical component of antitrust analysis.[2] *See NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 103 (1984). As Judge Easterbrook has explained, the antitrust "inquiry in each case is the ability to control output and prices, an ability that depends largely on the ability of other firms to increase their own output in response to a contraction by the defendants." *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986). In two-sided markets, ascertaining a rival's ability to respond to a defendant's reduction in its own output requires analyzing output effects on both of the market's sides.

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[2] *Amici* note that output may be difficult to measure where quality is an important component. Transaction volume is a particularly accurate measure of output here because it accurately reflects activity market-wide.

A. Output in Two-Sided Markets is Affected by the *Distribution* of Prices between the Sides, Not Just by Overall Price Levels

A platform operating in a two-sided market serves two or more distinct sets of customers who, in some way, rely upon each other—and accordingly upon the platform—to realize the particular value the platform provides. David S. Evans & Richard Schmalensee, *Markets with Two-Sided Platforms*, 1 ISSUES IN COMPETITION LAW AND POLICY 667, 669 (2008). There is an interdependency of demand between the two customer groups that the platform seeks to satisfy by bringing them together and by setting prices (and other attributes) that encourage both sides to participate in a way that maximizes platform-wide output. Rochet and Tirole—leaders in the development of the economics of two-sided platforms—offer this definition:

> We define a two-sided market[3] as one in which the volume of transactions between end-users depends on the

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[3] In discussing two-sided platforms, economists typically use the term "market" in a broader sense than how courts use the term for antitrust purposes. *See* Evans & Schmalensee, *Markets with Two-Sided Platforms*, *supra*, at 669 n.5.

> structure and not only on the overall level of the fees charged by the platform. A platform's usage or variable charges impact the two sides' willingness to trade once on the platform and, thereby, their net surpluses from potential interactions; the platforms' membership or fixed charges in turn condition the end-users' presence on the platform.

Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645, 646 (2006). In other words, in two-sided markets, output is affected not just by the overall price platform-wide, but also by the *distribution* of prices across the two sides. *See also* Benjamin Klein, *et al.*, *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 ANTITRUST L.J. 571, 598 (2006) ("The economic theory of two-sided markets indicates that relative prices on the two sides of the market are independent of the degree of competition faced by a supplier in such a market. While total prices will be influenced by competition, relative prices are determined by optimal balancing of demand on the two sides of the market.").

Two-sided markets are ubiquitous in the modern economy—examples range from newspapers to Internet search engines to sharing economy apps.

Joshua D. Wright & John Yun, *Stop Chug-a-lug-a-lugin 5 Miles an Hour on Your International Harvester: How Modern Economics Brings the FTC's Unfairness Analysis Up to Speed with Digital Platforms*, 83 GEO. WASH. L. REV. 2130, 2135-36 (2015). A classic example of a two-sided market is the market for credit cards: store owners do not want to invest in technology and contracts for credit cards consumers do not hold or use, while cardholders do not want credit card stores to refuse acceptance. *See, e.g.*, David S. Evans & Richard Schmalensee, *More than Money*, PAYING WITH PLASTIC - THE DIGITAL REVOLUTION IN BUYING AND BORROWING (2d ed. 2005); Evans & Schmalensee, *Markets with Two-Sided Platforms*, *supra*, at 667; Klein, *et al.*, *supra*, at 580-88. [4] Critically, consumers and merchants need payment methods that they both accept because that is the only way they can do business with one another. Merchants and cardholders are unable to solve this problem themselves, due to prohibitive transactions costs—bilateral contracts are simply not

[4] The work of William F. Baxter—to whom the original insights regarding the existence and economics of two-sided markets are usually attributed—was based upon his study of four-party payment systems and the general-purpose credit card systems. William F. Baxter, *Bank Interchange of Transactional Paper: Legal and Economic Perspectives*, 26 J.L. & ECON. 541 (1983).

an option—and externalities[5] that neither side can internalize, but that a platform, like Amex, can. *See* David S. Evans, *Some Empirical Aspects of Multi-Sided Platform Industries*, 2 REVIEW OF NETWORK ECONOMICS 191 (2003), *reprinted in* David S. Evans, PLATFORM ECONOMICS: ESSAYS ON MULTI-SIDED BUSINESSES 1, 30 (2011).

B. Analysis of Market-wide Output Effects is Required

The fundamental economic insight is that, in two-sided markets, overall competitive effects cannot be inferred from conduct or effects on one side of the market alone. What happens on one side of the market necessarily affects the other side, and so the platform faces tradeoffs in attempting to balance the competing interests of the two sides. *See, e.g.*, Klein, *et al.*, *supra*, at 577-88; Evans & Schmalensee, *Markets with Two-Sided Platforms*, *supra*, at 674-78. Numerous activities impact the distribution of costs and benefits across different sides of the market—but do not necessarily affect overall output.

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[5] "Externalities" arise when a party to a transaction does not internalize its full costs or benefits. *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

A common example in the economics literature is newspapers and their two distinct customer groups: advertisers and readers. Advertisers benefit when readers see their ads; readers benefit when advertisers pay for ads, which subsidizes the readers' cost of accessing the newspaper. But if there are too many ads, readers will value the newspaper less and be willing to pay less for it—i.e., fewer readers will purchase the paper. In turn, advertisers will reach fewer readers and value newspaper ad space less. The newspaper, then, must decide how to maximize output by balancing the interests of advertisers and readers. The demand sensitivities (that is, responsiveness to changes in price) of each side of the market will largely determine the alignment that maximizes output. Klein, *et al.*, *supra*, at 577-88.

It is common for two-sided platforms to compete for consumers by offering low-cost—even free—products or services to end consumers to entice them onto the platform, resulting in significant consumer benefits subsidized by firms (like advertisers). David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 COLUM. BUS. L. REV. 667, 668, 682, 688 (2005) ("Empirical surveys of industries based on [two-sided platforms] find many examples of prices that are low, or even negative, so that customers on one side are incentivized to participate in the platform."); Evans & Schmalensee, *Markets*

with Two-Sided Platforms, *supra*, at 667; David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multisided Platform Businesses*, 1 THE OXFORD HANDBOOK OF INT'L ANTITRUST ECON. 404-47 (2015). This result is expected, as end consumers are typically the more price sensitive side of the market. This is particularly true when individuals are on one side and companies, like advertisers or merchants, are on the other side. *See* Klein, *et al.*, *supra*, at 577-88; *see also* Erik Brynjolfsson & Joo Hee Oh, *The Attention Economy: Measuring the Value of Free Digital Services on the Internet*, THIRTY THIRD INT'L CONF. ON INFO. SYS. (2012) (estimating free internet services yielded a $100 billion per year increase in consumer welfare in the U.S.).

These same basic economic forces describe the credit card market. The credit card system is only useful if both cardholders and merchants participate. Cardholders will obtain cards only if merchants are known to accept them; merchants will arrange to accept only those cards that consumers are known to possess (and use). The relative sensitivity of the two sides to price changes will largely dictate the distribution of pricing between cardholders and merchants and, because cardholders are typically more price sensitive, merchants will tend to bear a larger fraction of the costs. Klein, *et al.*, *supra*, at 585-99. Thus, credit card companies will typically make changes to apportion more benefits toward

credit card holders and more costs to merchants, to maximize overall output in this two-sided market. *See id.* at 598 ("[C]hanges in Visa's and MasterCard's interchange fees over time reflect changes in competitive balancing of the two sides of the payment card market, and not changes in the market power of the Visa and MasterCard associations."). Such moves to realign the platform's costs and benefits are therefore consistent with procompetitive efforts to increase output.

Accordingly, it is *necessary* to consider what is happening on both sides of a two-sided platform to understand properly the implications of the platform's conduct. One side of the market may experience some burden from a rule or practice, but a significant benefit on the other may more than offset this burden; conversely, one side might experience modest benefits while the other is significantly hurt. There is nothing in the economics literature to support a presumption that one of these scenarios is more likely than the other. In other words, the economics literature does not support the proposition that demonstrating harm on one side of a two-sided platform is sufficient to establish any presumption that *market-wide* consumer welfare decreased. To the contrary, there is significant literature discussing how and why altering the allocation of benefits between the two sides can result in overall increases to consumer welfare, by better aligning the tradeoffs

to maximize results (the goal of the platform as a rational, profit-maximizing actor). *See, e.g.*, Klein, *et al.*, *supra*, at 577-88; Evans & Schmalensee, *Markets with Two-Sided Platforms*, *supra*, at 674-78; Evans & Noel, *supra*, at 680-84. The simple reallocation of costs and benefits across the two sides of a two-sided market can be output increasing, output reducing, or output neutral. Looking to effects on one side simply cannot distinguish between these scenarios.

As such, a rule that presumes that harm to one side of a two-sided market is sufficient to demonstrate harm to consumer welfare (and to shift the plaintiff's burden) is likely to lead to serious errors that are costly to competition and consumers. Consider a scenario in which a two-sided platform competes vigorously with other two-sided platforms. In this situation, competing platforms may charge high prices to one side of the platform, e.g., the advertisers, but prices well below marginal cost to the other side, e.g., the end users. Analyzing one side of the platform would then lead to the bizarre conclusion that the platforms are engaging in both supra-competitive (advertiser side) and predatory (user side) pricing. In fact, however, the vigorous competition with other platforms actually prevents the platform from harming the market *as a whole*. Brief of Dr. David S. Evans & Prof. Richard Schmalensee as Amici Curiae in Support of Appellants-Cross Appellees at 18-19, *US Airways,*

Inc. v. Sabre Holdings Corp., No. 17-960 (2d Cir. filed July 26, 2017). Moreover, these simultaneous pricing practices often *expand* market output, thereby enhancing consumer welfare – as in the very market at issue here. Thus, it is clear that evidence of pricing effects on one side or another is equivocal—such effects provide no real insight into the competitive landscape.

Market output should be the focus of the analysis. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 31-33 (1984); ROBERT H. BORK, THE ANTITRUST PARADOX (1978); Jonathan M. Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust*, THE ANTITRUST SOURCE (Aug. 2015). The ability to restrict output is what allows a monopolist ultimately to increase prices. *See, e.g.*, IIB PHILIP E. AREEDA, ET AL., ANTITRUST LAW, AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶ 501 (4th ed. 2017) ("Market power is the ability to raise price profitably by restricting output."). Unlike prices—which, as discussed above, might appear simultaneously as predatory on one side of the market and supra-competitive on the other—output tells us what is happening in the market *as a whole*. If market-wide output has decreased, that is evidence of a potential anticompetitive effect; if output has remained steady or increased, however, that is evidence of a healthy, competitive market. *See, e.g.*, Thomas A. Lambert, *A*

Decision-Theoretic Rule of Reason for Minimum Resale Price Maintenance, 55 ANTITRUST BULLETIN 167 (2010) (explaining why output is the proper metric for antitrust analysis).

While price effects can be illuminating in antitrust analysis, they are only associated with the exercise of market power when they are accompanied by a reduction in output. That is, a monopolist typically increases prices by restricting output. *See, e.g.*, IIB PHILIP E. AREEDA, ET AL., *supra*, ¶ 501; *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) ("Prices increase marketwide in response to the reduced output because consumers bid more in competing against one another to obtain the smaller quantity available."); *Ball Mem'l Hosp.*, 784 F.2d at 1335 ("Market power comes from the ability to cut back the market's total output and so raise price[.]"). Accordingly, antitrust analysis typically focuses upon output, utilizing pricing evidence where the price-increasing conduct is well-understood to correspond with decreased output, but recognizing that this utility may be limited in certain cases. *See Bus. Elecs. Corp.*, 485 U.S. at 723 (describing "manifestly anticompetitive" conduct as "conduct 'that would always or almost always tend to restrict competition and decrease output[.]'" (quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985))); *see also* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW

DEVELOPMENTS 227 (8th ed. 2017) ("[D]irect evidence of supracompetitive pricing must be accompanied by evidence of restricted output[.]").

Accordingly, when a case involves a two-sided market, an antitrust plaintiff's *prima facie* burden must include a demonstration of a market-wide reduction in output.[6]

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[6] Note that not every case involving two-sided platforms will necessarily involve a two-sided *antitrust-relevant* market. For example, in *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), the issue was the elimination of competition for the card-issuing business of banks. Although the elimination of that competition ultimately affected merchants and cardholders, the focus was appropriately limited to effect on the banks because the merchant and cardholder effects could not mitigate or exacerbate the bank effect. This fact distinguishes *Visa* because here, Amex is competitively constrained in altering prices and conduct towards merchants by effects on both the merchant and the cardholder sides of the market. *See* App'x at 34a-36a.

II. AS THE SECOND CIRCUIT PROPERLY HELD, ANTITRUST LAW DOES—AND SHOULD CONTINUE TO—REQUIRE A PLAINTIFF TO DEMONSTRATE HARM TO COMPETITION MARKET-WIDE

A. Plaintiff's Burden Is, and Should Remain, to Prove Harm to the Market as a Whole

Antitrust law's rule of reason burden-shifting framework is by now well-established. *See United States v. Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir. 2001) (en banc). The plaintiffs bear the burden, in the first instance, to demonstrate harm to competition. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984). The burden of production (not proof) then shifts to defendants, who can rebut this demonstration, for instance, by showing why plaintiffs' *prima facie* case fails to paint an accurate picture or by proffering evidence of procompetitive effects. *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 771 (1999); *see also FTC v. Actavis, Inc.*, 570 U.S. 136, 133 S. Ct. 2223, 2236 (2013); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 483 (1992); *United States v. Gen. Dynamics Corp.*, 415 U.S. 486 (1974) (rejecting effort to enjoin a merger of firms with historically high shares because those shares did not accurately reflect their competitive position going forward). If defendants offer such evidence, the burden of production moves back to the plaintiff

and merges with the burden of persuasion, which always remains with the plaintiffs in rule of reason cases.[7] But how does a plaintiff satisfy these burdens?

Antitrust analysis, screens, and presumptions are properly tethered to economic understanding and insights. *See Leegin*, 551 U.S. at 887, 889-92 (refusing to apply a *per se* rule of illegality when doing so "would undermine, if not overrule, the traditional 'demanding standards' for" *per se* rules, because no economic basis for this rule existed (quoting *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977))); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (recognizing "[m]istaken inferences and the resulting false condemnations" may be "'especially costly'" (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986))); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 458 (1993) ("[T]his Court and other courts have

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[7] While the *NCAA* Court stated that the petitioner faced a "heavy burden of establishing [its] affirmative defense," this statement arose in a context in which the conduct explicitly raised prices and reduced output. *NCAA*, 468 U.S. at 113-14; *cf. Cal. Dental*, 526 U.S. at 771. In a standard rule of reason case, as here, the burden of proof remains with the plaintiff. *See United States v. Baker Hughes Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990).

been careful to avoid constructions of § 2 which might chill competition, rather than foster it."); Easterbrook, *The Limits of Antitrust*, *supra*, at 10-11; Bork, *The Antitrust Paradox*, *supra*, at 133. Relevant to the case at hand, no economic basis exists for establishing a presumption that "harm" on one side of a two-sided platform is sufficient to demonstrate that market output has been restricted, or that consumer welfare has otherwise been harmed. This is particularly true when the alleged harm is price effects that, as discussed above, may be positive or negative on one side of the market—and may be opposite on the other side—all without altering market-wide welfare or effects.

An antitrust plaintiff's burden is to demonstrate harm to competition, which is defined as harm to the competitive process or to consumers. *Spectrum Sports*, 506 U.S. at 458; *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). The Government, however, would have the Court lessen the plaintiff's burden by allowing it to be satisfied by evidence of price effects limited to an artificially isolated and misleading component of the relevant market. This argument commits two fundamental errors.

First, it erroneously ignores output effects and presumes price effects are conclusive of, or at least tend to provide good evidence regarding, harm to consumers. As noted, price effects are relevant to the

extent they are consistent with a reduction in market output or an increase in quality-adjusted market-wide cost to consumers. However, this Court has rejected the proposition that price effects are sufficient to discharge a plaintiff's burden in contexts where these effects are not informative of an output reduction—for instance, when a price increase is implemented to reflect a quality increase. *See, e.g., Leegin*, 551 U.S. at 895, 889-92; *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993) ("Where, as here, output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand."); Lambert, *supra*.[8] The *Leegin* Court explicitly held that the respondent was "mistaken in relying on pricing effects absent a further showing of anticompetitive conduct," recognizing "prices can be increased in the course of promoting procompetitive effects." 551 U.S. at 895-96 (citing *Bus. Elecs. Corp.*, 485 U.S. at 728).

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[8] *See also* Transcript of Oral Argument at 15, *Leegin*, *supra* (Scalia, J.: "So the mere fact that it would increase prices doesn't prove anything. . . . If, in fact, it's giving the consumer a choice of more service at a somewhat higher price, that would enhance consumer welfare, so long as there are competitive products at a lower price[.]").

In other words, when both prices and output increase, courts do not condemn the conduct because these simultaneous results do not indicate that competition has been restricted or consumer welfare harmed. *See Brooke Grp.*, 509 U.S. at 237; App'x at 29a. Since market-wide output in two-sided markets is dependent upon the *distribution* of prices between the two sides, and not just upon the overall prices set for each side, price effects here are particularly uninstructive. *See* Rochet & Tirole, *supra*, at 646; Klein, *et al.*, *supra*, at 599.

Second, Petitioners' argument inappropriately divorces inherently intertwined aspects of the market. Plaintiffs cannot lessen their burden by artificially cordoning off segments of the market, and then purporting to show harm only in that artificially segregated piece. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 31 (1984) (remanding the case because there was "no showing that the ***market as a whole*** ha[d] been affected at all by the contract" (emphasis added)), *abrogated in part on other grounds by Ill. Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006); *see also* App'x at 49a-50a ("Here, the market *as a whole* includes both cardholders and merchants, who comprise distinct yet equally important and interdependent sets of consumers sitting on either side of the payment-card platform.").

Indeed, the Court has rejected such requests to deviate from market-wide impact as the lodestar of competitive effects, either through market definition tricks or by redefining the appropriate locus of harm to something else—like solely intrabrand competition—that, in isolation, offers a misleading understanding of market effects. The *Leegin* Court, for instance, refused to accept the plaintiff's argument that higher prices and harm to intrabrand competition divorced from an analysis of market-wide effects was sufficient to demonstrate harm to competition. 551 U.S. at 889-92. Rather, the Court recognized that analyzing intrabrand competition effects, alone, yielded erroneous conclusions regarding overall competitive effects. *Id.* This is because looking only at intrabrand competition analyzes the wrong price and output effects. Specifically, it fails to examine market-wide effects. *See also Jefferson Parish*, 466 U.S. at 32; *Monsanto*, 465 U.S. at 762 ("In *Sylvania* we emphasized that the legality of arguably anticompetitive conduct should be judged primarily by its '***market impact***'" (emphasis added) (quoting *Sylvania*, 433 U.S. at 51)).

Other cases are not to the contrary. For example, in *United States v. Philadelphia National Bank*, the Court rejected the notion that efficiencies in a different geographic (single-sided) market could be used by the defendant to shift the burden back to plaintiffs. 374 U.S. 321 (1963). This is a very

different factual setting than the one involved here, where the geographic market is the same and the interdependency of demand between cardholders and merchants is well recognized.

Moreover, a rule permitting Petitioners' artificial distinction and examining only one side of a two-sided market would unnecessarily and inappropriately increase the costs of antitrust intervention. *See Trinko*, 540 U.S. at 414; *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 283-84 (2007). Primarily, it would significantly increase the prevalence of false positive (Type I) errors, and thereby chill the very procompetitive conduct antitrust law seeks to foster. Petitioners' rule presumes that a demonstration of effects on one side of a two-sided market sufficiently represents market-wide effects. But modern economics provides no basis for such a presumption. To the contrary, economic analysis demonstrates that consumer welfare might increase, decrease, or remain steady when prices change on one side of a two-sided platform. Accordingly, analyzing just one side of a two-sided market is likely to mislead courts erroneously to condemn procompetitive conduct. It may also lead enforcers to wrongly allow anticompetitive conduct to persist; for instance, an enforcer might analyze effects on one side of the market, observe they were positive, and decide not to

investigate further—despite harms arising on the other side and market-wide.

Allowing a plaintiff to discharge its initial burden by demonstrating harm on only one side of a two-sided market runs afoul of both basic legal principles and sound economics. This is particularly true when both prices and output have increased. Accordingly, antitrust law should—and does—reject an approach that would allow plaintiffs to satisfy their burden by drawing artificial distinctions within an antitrust-relevant market and citing to only price effects within that artificial segment.

B. The Second Circuit Correctly Found Petitioners Failed to Satisfy Their Burden

This case demonstrates the dangers of condemning conduct in a two-sided market based upon an analysis of only one side of the market. App'x at 31a-40a. As the Second Circuit correctly noted, "[s]eparating the two markets allows legitimate competitive activities in the market for general purposes to be penalized no matter how output-expanding such activities may be." *Id.* at 34a-35a. Such condemnation would chill firms from engaging in output-expanding, i.e., procompetitive, conduct, a result that undermines the very goals of the antitrust laws. *See Brooke Grp.*, 509 U.S. at 237; *see also NCAA*, 468 U.S. at 103 ("*Broadcast Music*

squarely holds that [certain] arrangement[s] may be so efficient that [they] will increase sellers' aggregate output and thus be procompetitive." (citing *BMI v. CBS*, 441 U.S. 1, 18-23 (1979))).

Here, there was no evidence of diminished output. Quite to the contrary, as the Second Circuit found, "the evidence presented at trial suggested that industry-wide transaction volume has substantially *increased* and card services have significantly *improved* in quality." App'x at 52a. Total transaction dollar volume is an appropriate measure of output here because it speaks to the level of market-wide output, both on the cardholder and merchant sides. Notably, Petitioners acknowledge as much by selecting this metric as the basis for calculating market shares.

Petitioners even conceded at oral argument before the Second Circuit that "credit-card networks are offering more and better cardholder benefits than ever before, including enhanced fraud-protection services, airline miles, and cash-back rewards." *Id.* In other words, both quality and output improved market-wide and thus, even if prices also increased on the merchant side, such "rising prices [we]re equally consistent with growing product demand." *Brooke Grp.*, 509 U.S. at 237. This is particularly true here, given that output in two-sided markets is affected not only by the overall price level charged

(on one or both sides), but also by the distribution of prices between the two sides. *See* Rochet & Tirole, *supra*, at 646; Klein, *et al.*, *supra*, at 599. Here, it is reasonable to expect any increased costs would be distributed (disproportionately) to the less demand-sensitive side, meaning increased merchant prices are a predicted result in a competitive, expanding market.

Moreover, the non-discrimination provisions (NDPs) were strengthened at a time when Amex was struggling, largely due to successful Visa campaigns like "We Prefer Visa." App'x at 19a. The restraints were apparently intended to—and evidence of increased market-wide output suggests they did—help Amex compete in an aggressively competitive environment. These restraints did not prevent credit card companies from competing for merchants; that is, they did not preclude merchants from accepting any and all other cards. For instance, the record reflects that Discover was accepted at about 3 million *more* merchant locations nationwide than Amex. *See* App'x at 13a, 85a, 151a. So Discover, the smallest competitor in the relevant market, was plainly not excluded from merchant locations by Amex's NDPs. That cardholders opted to use Discover less frequently despite its wider acceptance speaks volumes about the importance of acknowledging the competition and consumer benefits on the cardholder side.

The NDPs also prevent free-riding, thereby fostering the realization of consumer benefits. As Amex and the Second Circuit correctly note, merchants have strong incentives to use Amex's brand name to entice high-spend customers to its locations and then—once assured of the sale by Amex's name—to convince them to substitute away from Amex for the actual purchase. App'x at 50a. This behavior is a quintessential example of free-riding, the elimination of which can increase competition and enhance consumer welfare, as this Court has repeatedly recognized. *See, e.g.*, *Leegin*, 551 U.S. at 890-92; *Sylvania*, 433 U.S. at 54-56. The Second Circuit correctly explained that the NDPs aligned merchants' incentives with Amex's, thereby allowing merchants to use Amex's brand name to attract more customers, and allowing Amex to benefit from this use—and, in turn, to offer additional consumer benefits. That is, the NDPs helped achieve benefits across the two-sided platform. App'x at 50a-51a & n.54 (citing Klein, *et al.*, *supra*, at 580).

In fact, contrary to arguments certain *amici curiae* proffer, credit cards offer benefits that extend beyond those individual cardholders receive for using a given card for a given transaction. *See* Brief for United States Public Interest Research Group Education Fund, Inc., *et al.* at 9-11, 13-14, *State of Ohio, et al. v. American Express Co., et al.*, No. 16-

1454 (Dec. 14, 2017). Their erroneous arguments rest upon the "unrealistic assumption," unsupported by sound empirical data, that consumers would make precisely the same purchases regardless of whether they used (or even owned) credit cards and, accordingly, that the cost to merchants of accepting credit cards simply increases the costs of goods and services. *See* Steven Semeraro, *Assessing the Costs & Benefits of Credit Card Rewards: A Response to Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations*, 25 LOY. CONSUMER L. REV. 30, 47-59 (2012). In other words, this argument assumes that credit cards are just a tax on merchants, without economic benefit, that is ultimately passed on to consumers.

But merchants accept credit cards precisely because they benefit from doing so. Consider the costs of other forms of payment like checks—which may be returned unpaid—and cash—which both increases labor costs (e.g., requiring proper counting and accounting for cash in the register) and poses a much higher risk of theft. Semeraro, *supra*, at 47-49; Timothy J. Muris, *Payment Card Regulation and the (Mis)Application of the Economics of Two-Sided Markets*, 2005 COLUM. BUS. L. REV. 515, 538 (2005). These costs may very well equal or exceed the cost of accepting credit cards. Semeraro, *supra*, at 47-49; Margaret E. Guerin-Calvert & Janusz A. Ordover, *Merchant Benefits and Public Policy towards*

Interchange: An Economic Assessment, 4 REVIEW OF NETWORK ECONOMICS 1, 18-19 (2005) ("Review of the empirical evidence shows . . . the costs of providing these [check guarantee] services are roughly comparable—if not somewhat higher—than those for credit card 'payment guarantee' services."). Indeed, if credit cards only increased merchants' costs and offered no offsetting benefits—as *amici*'s argument contends—merchants would accept no credit cards at all.

Among the merchant benefits are that credit cards facilitate additional consumer purchases—with credit cards, consumers are not constrained by the amount of cash in their wallets at a given moment, or by whether they are carrying their checkbooks. Of course, different consumers may benefit to different degrees at different times. But this is quite common. Consider a merchant that offers free parking. Offering this service increases the merchant's costs (as does offering credit cards), and not every customer will avail themselves of the benefits every time (as with credit cards). That not every customer will utilize free parking on every visit would not, however, negate the many benefits of the free parking lot—just as with credit cards. In fact, consumers who do not currently own credit cards could likely obtain one and reap the benefits of the card far more easily than consumers who do not own

cars could obtain a car (plus required insurance, gas, etc.) and benefit from the free parking.

Accordingly, the evidence is consistent with procompetitive market conditions and fails to support a presumption of anticompetitive harm, as the Second Circuit correctly held.

III. MARKET POWER IS A CRITICAL SCREEN IN VERTICAL CASES

Proof of a defendant's market power is a long-standing requirement in antitrust analysis. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). The term refers to a firm's ability to control prices by restricting market output, and is essential to both economic and legal theories of anticompetitive harm. *Id.*; *Jefferson Parish*, 466 U.S. at 27 & n.46.

A. The Restraints at Issue in This Case are Classic Vertical Restraints

The Second Circuit, District Court, and the parties all agree the restraints at issue here are "vertical" for antitrust purposes; that is, they primarily restrain behavior between companies at different points in the production chain. App'x at 29a-30a. The NDPs, for instance, prevent merchants—who operate at a different level than credit card companies—from attempting to convince

cardholders to switch to other card options at the point of purchase.

The Second Circuit rightly rejected the Government's attempt—renewed in this appeal—to characterize the vertical restraints at issue as somehow different from other vertical restraints, owing to their implications for horizontal competition. App'x at 30a & n.42; Brief for the Petitioners and Respondents Nebraska, Tennessee, and Texas, at 16, *State of Ohio, et al. v. American Express Co., et al.*, No. 16-1454 (Dec. 7, 2017). The Second Circuit correctly explained that it has "never drawn this type of distinction between any varieties of vertical restraints[.]" 29a-30a & n.42. This is with good reason. Vertical restraints that affect horizontal interbrand competition are simply not the novelty Government attempts to paint them to be. Rather, many—indeed, most—vertical restraints affect horizontal competition. Plaintiffs invariably allege competition was harmed because the vertical restraint somehow prevented horizontal rivals from effectively competing—precisely what Petitioners argue differentiates their argument here.

Traditional vertical restraint theories fully cover these concerns, as well as their procompetitive justifications. It is, for instance, well-recognized that vertical restraints can enhance a form of horizontal competition commonly referred to as competition for

the contract. As Judge Easterbrook has explained, "Competition-for-the-contract is a form of competition that antitrust laws protect rather than proscribe, and it is common." *Paddock Publ'ns, Inc. v. Chi. Tribune Co.*, 103 F.3d 42, 45 (7th Cir. 1996). This kind of competition often derives from, or is fostered by, vertical restraints like exclusive and slotting contracts. For example, an exclusive arrangement may require a retailer to purchase only from a single supplier. While a vertical restraint, this arrangement has an obvious horizontal component. *See* Benjamin Klein & Kevin M. Murphy, *Exclusive Dealing Intensifies Competition for Distribution*, 75 ANTITRUST L.J. 433 (2008).

Similarly, slotting agreements typically require complying merchants to favor certain brands over others, by, e.g., providing superior placement / advertising. That the merchant commits to favoring one brand over another in dealing with end consumers—as opposed to merely appearing neutral between them, as is the case here—does not necessarily mean that other brands are now competing less vigorously for that placement, or that horizontal competition has otherwise diminished. *See, e.g.*, Joshua D. Wright & Benjamin Klein, *The Economics of Slotting Contracts*, 50 J.L. & ECON. 421 (2007); Joshua D. Wright, *Slotting Contracts and Consumer Welfare*, 74 ANTITRUST L.J. 439 (2007). And such arrangements certainly seem, on their face,

to have potential horizontal competition implications at least as significant as those here.

Likewise, this Court has long recognized that vertical restraints can and do implicate horizontal, or interbrand, competition.[9] *See, e.g.*, *Leegin*, 551 U.S. at 889-92 ("Absent vertical price restraints, the retail services that enhance [horizontal] interbrand competition might be underprovided."); *Bus. Elecs. Corp.*, 485 U.S. at 728-31 & n.4 ("The dissent apparently believes that whether a restraint is horizontal depends upon whether its anticompetitive *effects* are horizontal, and not upon whether it is the product of a horizontal agreement. . . . but if [that] were the language of antitrust analysis there would be no such thing as an unlawful vertical restraint, since all anticompetitive effects are by definition horizontal effects."); *Sylvania*, 433 U.S. at 52-56. Accordingly, the Second Circuit correctly rejected the Government's distinction as one "without meaningful difference to the antitrust analysis in this case." Appx' at 29a-30a & n.42.

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[9] Moreover, even if horizontal competition is affected, there remains no economic basis to analyze the effects on one side of a two-sided platform to the exclusion of the effects across both sides of the platform.

B. The Basic Economics of Vertical Restraints Require Market Power for Anticompetitive Harm to Arise

Economic literature demonstrates that vertical restraints offer tremendous consumer benefits, and only on rare occasion yield anticompetitive results. *See* James C. Cooper, et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 641 (2005) ("The theory shows that vertical practices potentially can harm competition. This finding is fragile, however, as anticompetitive equilibria emerge only under specific—and difficult to verify assumptions. . . . Seemingly minor perturbations to these assumptions can reverse the predicted welfare effects of the practice in question."); Oliver E. Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, 127 U. PA. L. REV. 953 (1979). Vertical restraints can, for instance, diminish double marginalization, mitigate free riding on manufacturer-supplied investments, and align manufacturer with distributor incentives. *See* Wright & Klein, *supra*; Benjamin Klein & Andres V. Lerner, *The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free-Riding and Creates Undivided Loyalty*, 74 ANTITRUST L.J. 473 (2007); Benjamin Klein & Kevin M. Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31

J.L. & ECON. 265 (1988); Howard P. Marvel, *Exclusive Dealing*, 25 J.L. & ECON. 1 (1982).

All modern theories of how vertical restraints can potentially harm competition—and examples of when they actually do so—rely upon defendant's market power. The prevailing Section 1 paradigm is that of foreclosure or "raising rivals' costs" (RRC). *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power over Price*, 96 YALE L.J. 209, 214 (1986); Steven C. Salop & David T. Scheffman, *Cost-Raising Strategies*, 36 J. INDUS. ECON. 19, 19–20 (1987); Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983). Under these theories, a dominant firm can effectively prevent, or foreclose, rivals from reaching consumers or from accessing critical inputs at competitive rates. The firm's ability to foreclose rivals is, in turn, a result of its market power; absent market power, the firm could not prevent rivals from circumventing it and directly doing business with consumers or suppliers. *See* Easterbrook, *The Limits of Antitrust*, *supra*, at 13-15. Thus, the fundamental ability of a firm to foreclose rivals is derivative of its market power. *See* Timothy J. Muris, *The FTC and the Law of Monopolization*, 67 ANTITRUST L.J. 693, 696 (2000) ("[T]he anticompetitive—that is, exclusionary—conduct must be linked to the monopoly.").

The market power demonstration is, furthermore, critical to properly managing the risk of errors in vertical restraint cases. *See* Easterbrook, *The Limits of Antitrust*, *supra*, at 13-15. Because firms lacking market power will be unable to foreclose rivals, this requirement both (1) helps courts and enforcers to avoid false positives (without substantially increasing the risks of false negatives); and (2) reduces administrative costs of an antitrust regime, including investigative and lawsuit costs that can be short-circuited when the defendant lacks the requisite market power. Again, the difficulty of distinguishing pro- versus anticompetitive effects, as well as the asymmetrically high costs of false positives—which may forever chill conduct that benefits consumers—make clear that courts should proceed with caution before condemning potentially procompetitive behavior. *Id.*; *Spectrum Sports*, 506 U.S. at 458-59. The market power requirement provides an economically-grounded and principled screen to assist courts in this endeavor.

Moreover, the market power requirement is well-justified by the empirical evidence. *See* Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, HANDBOOK OF ANTITRUST ECONOMICS 391, 408 (2008) ("The current rule-of-reason approach, combined with 'safe harbors' for manufacturers with low market shares, seem more

than justified based on this evidence."). Indeed, empirical analyses have clearly and consistently found that, in practice, vertical restraints tend to enhance consumer welfare and only rarely result in negative welfare effects. *See* Daniel P. O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems,* THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 72-73, 76 (2008) (reviewing the empirical literature and concluding, "[w]ith few exceptions, the literature does not support the view that these practices are used for anticompetitive reasons. This literature supports a fairly strong prior belief that these practices are unlikely to be anti-competitive in most cases"); Lafontaine & Slade, *supra*, at 408 (reviewing several studies and concluding, "voluntarily adopted restraints are associated with lower costs, greater consumption, higher stock returns, and better chances of firm survival"); Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629, 680 (2007) ("[U]nder most circumstances, profit-maximizing vertical-integration decisions are efficient, not just from the firms' but also from the consumers' points of view. . . . we have found clear evidence that restrictions on vertical integration . . . are usually detrimental to consumers."); Cooper, *et al.*, *supra*, at 648-58 ("Most studies find evidence that vertical restraints/vertical integration are pro-competitive[.]"); *see also* Letter from FTC Staff to Marlene H. Dortch, Secretary, FCC

at 28 (July 17, 2017), https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-bureau-consumer-protection-bureau-competition-bureau-economics-federal-trade/ftc_staff_comment_to_fcc_wc_docket_no17-108_7-17-17.pdf ("Most forms of vertical integration can generate procompetitive efficiencies, thus antitrust analysis generally regards them as harmless or even beneficial to consumer welfare.").

Accordingly, economic theory and empirical evidence clearly demonstrate that substantial market power is a necessary prerequisite to a firm's (rare) ability to use vertical restraints to harm competition.

C. Established Case Law on Vertical Restraints Supports the Use of Market Power as a Screen in Antitrust Analysis

Courts have likewise recognized that vertical restraints tend to offer numerous consumer benefits and, accordingly, require a demonstration of market power sufficient to restrict market-wide output before finding vertical restraints unlawful. *See Leegin*, 551 U.S. at 889-92; *Sylvania*, 433 U.S. at 54-57. Courts have, for instance, established a market power prerequisite for tying cases. *Jefferson Parish*, 466 U.S. at 13-15 ("[W]e have condemned tying arrangements when the seller has some special ability—usually called 'market power'—to force a

purchaser to do something that he would not do in a competitive market." (citing, *inter alia*, *United States Steel Corp. v. Fortner Enters, Inc.*, 429 U.S. 610, 620 (1977))).[10] The *Leegin* Court similarly explained the necessity and utility of the market power requirement in vertical restraint cases:

> [T]hat a dominant manufacturer or retailer can abuse resale price maintenance for anticompetitive purposes may not be a serious concern unless the relevant entity has market power. If a retailer lacks market power, manufacturers likely can sell their goods through rival retailers. And if a manufacturer lacks market power, there is less likelihood it can use the practice to keep competitors away from distribution outlets.

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[10] *See also PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 815 n.2 (6th Cir. 1997); *Digital Equip. Corp. v. Uniq Digital Techs., Inc.*, 73 F.3d 756, 761-63 (7th Cir. 1996) ("[S]ubstantial market power is an indispensable ingredient of every claim under the Rule of Reason."); *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 797 (1st Cir. 1988) (Breyer, J.) ("The plaintiffs here cannot meet the significant 'market power' requirement of *Jefferson Parish*.").

551 U.S. at 898 (citation omitted). That is, the market power requirement provides a critical screen, offering a clear criterion that must be satisfied for anticompetitive harm to arise. This screen helps antitrust courts to properly balance Type I and II errors in vertical restraint cases.

Substantial market power is defined as the ability to restrict market-wide output, and thereby to increase market-wide prices, within an antitrust-relevant market. *Jefferson Parish*, 466 U.S. at 27, n.46 ("As an economic matter, market power exists whenever prices can be raised above the levels that would be charged in a competitive market."); *Rebel Oil*, 51 F.3d at 1434 ("A predator has sufficient market power when, by restricting its own output, it can restrict marketwide output and, hence, increase marketwide prices."); *Ball Mem'l Hosp.*, 784 F.2d at 1335 ("Market power comes from the ability to cut back on the market's total output and so raise price[.]"); Muris, *The FTC and the Law of Monopolization*, *supra*, at 696 ("In both law and economics, such power is defined as the ability to raise price and restrict output in an industry."). In turn, assessing the existence of a firm's market power requires a working understanding of the relevant market. As developed above, properly understanding the effects of conduct in two-sided markets demands an assessment of how both sides of the market react to given stimuli. No principled or

economic basis exists for accepting the artificial distinction Petitioners identify between the merchant and the cardholder side.

Here, cutting cardholders out of the relevant market artificially shrinks the market—and, in doing so, omits any consideration of the significant competition occurring for cardholders that inherently implicates merchant-side competition. Credit card companies, in fact, compete aggressively for cardholders today. There is no serious argument or evidence that competition for cardholders has decreased. To the contrary, cardholders have more access and options than ever, and benefits have improved meaningfully. *See* App'x at 52a.

Focusing solely upon the merchant side is particularly misleading regarding market power here. It is expected that a platform balancing the competing demands of its two customer groups would experiment by shifting increasing costs to the less demand-sensitive side of the market. Klein, *et al.*, *supra*, at 585-99. Given output (in the form of transaction volume) was increasing here, it is also expected that prices might also rise. App'x at 52a; *Brooke Grp.*, 509 U.S. at 237. That credit card companies would increase prices to merchants—as the side more willing to bear the increased cost burden—at this time is, accordingly, fully anticipated

and consistent with healthy competition. Klein, *et al.*, *supra*, at 585-99.

Moreover, as Klein, *et al.* have explained, "the economic theory of pricing in two-sided markets indicates that [merchant acceptance fees] are not a measure of payment card system market power." *Supra*, at 594. Market power refers to an ability to affect the total price of the payment system market-wide, i.e., for both cardholders and merchants. But "the role of interchange fees is to influence *relative* merchant and cardholders prices and not the total price collected by the payment system." *Id.*; *see also* Rochet & Tirole, *supra*, at 646; Evans & Noel, *supra*, at 669 ("[A] recent effort in Australia to place a cap on the fees charged by credit card systems to merchants has resulted in an increase in annual fees (paid by consumers) for credit cards."); Julian Morris, et al., PUNISHING REWARDS: HOW CLAMPING DOWN ON CREDIT CARD INTERCHANGE FEES CAN HURT THE MIDDLE CLASS 19-24 (2017) ("[T]he evidence suggests that capping interchange fees . . . has had a net negative effect on consumers[.]"). Accordingly, the district court's reliance upon Amex's pricing to merchants to ascertain market power was largely misplaced. *See* App'x at 165a-166a; App'x at 43a-44a.

Consider further that Amex's offering better benefits to its valuable, spend-heavy card holders encourages them to use their card more often—which

the record makes clear they do. Despite being available at 3 million fewer merchant locations than Discover, Amex accounts for significantly more transaction volume than Discover. App'x at 13a, 85a. This increased consumer use of Amex cards benefits merchants that accept Amex—and, accordingly, encourages them to free ride off Amex's brand.

Accordingly, the Second Circuit correctly held market power is a necessary prerequisite to finding a vertical restraint violates Section 1 and, further, the Government failed to demonstrate Amex commanded the requisite market power.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the Court affirm the Second Circuit's decision.

Respectfully Submitted,

JONATHAN M. JACOBSON
Counsel of Record
DANIEL P. WEICK
WILSON SONSINI GOODRICH
& ROSATI, P.C.
1301 Avenue of the Americas
New York, New York 10019
(212) 497-7700
jjacobson@wsgr.com
dweick@wsgr.com

Elyse Dorsey
WILSON SONSINI GOODRICH
& ROSATI, P.C.
1700 K Street, N.W.
Washington, D.C. 20006
(202) 973-8800
edorsey@wsgr.com

January 23, 2017

Attorneys for Amici Curiae

APPENDIX

APPENDIX A[11]

Babette E. Boliek, Associate Dean for Research and Faculty Development and Associate Professor of Law, Pepperdine School of Law

James C. Cooper, Associate Professor of Law and Director, Program on Economics & Privacy, Antonin Scalia Law School at George Mason University

Richard A. Epstein, Laurence A. Tisch Professor of Law and Director, Classical Liberal Institute, New York University School of Law

Stephen Haber, A.A. and Jeanne Welch Milligan Professor in the School of Humanities and Sciences and Peter and Helen Bing Senior Fellow of the Hoover Institution, Stanford University

Thomas Winslow Hazlett, H.H. Macaulay Endowed Professor of Economics, Clemson University

Justin (Gus) Hurwitz, Assistant Professor of Law and Co-Director of Space, Cyber, and Telecom Law Program, University of Nebraska College of Law

---

[11] Institutional affiliations are given for identification purposes. The views expressed in this brief are those of *amici curiae* only and may not reflect the views of their schools, which are not signatories to this brief.

Jonathan Klick, Professor of Law, University of Pennsylvania Law School

Thomas Lambert, Wall Chair in Corporate Law and Governance and Professor of Law, University of Missouri School of Law

Abbott Lipsky, Adjunct Professor, Antonin Scalia Law School, and Director of Competition Advocacy Program, Global Antitrust Institute, at George Mason University

Geoffrey A. Manne, Founder and Executive Director, International Center for Law and Economics (ICLE), and Distinguished Fellow, Searle Center on Law, Regulation, & Economic Growth at Northwestern University School of Law

Steven Semeraro, Professor of Law and Director, Intellectual Property Fellowship Program, Thomas Jefferson School of Law

David J. Teece, Professor in Global Business and Faculty Director, Tusher Center for the Management of Intellectual Capital Haas Business and Public Policy Group, University of California Berkeley, Haas School of Business

Joshua D. Wright, University Professor, Antonin Scalia Law School, and Executive Director, Global Antitrust Institute, at George Mason University

Christopher S. Yoo, John H. Chestnut Professor of Law, Communication, and Computer & Information Science; and Founding Director, Center for Technology, Innovation & Competition, University of Pennsylvania

John M. Yun, Associate Professor of Law, Antonin Scalia Law School, and Director of Economic Education, Global Antitrust Institute, at George Mason University

No. 16-1454

IN THE

Supreme Court of the United States

STATES OF OHIO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MONTANA, RHODE ISLAND, UTAH, AND VERMONT,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, AND AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICUS CURIAE* AUSTRALIAN RETAILERS ASSOCIATION IN SUPPORT OF PETITIONERS

ROBERT N. KAPLAN
Counsel of Record
KAPLAN FOX & KILSHEIMER LLP
850 Third Avenue, 14th Floor
New York, NY 10022
(212) 687-1980
rkaplan@kaplanfox.com

Counsel for Amicus Curiae

December 14, 2017

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INTEREST OF *AMICUS CURIAE*[1]

The Australian Retailers Association ("ARA") has been deeply involved in the reform of the payment card market in Australia and is acutely aware of the effects of the elimination in Australia of the "anti-steering" rules previously imposed on merchants by the credit card networks. Given the similarities between the Australian and American markets, the ARA believes that Australia's experience over the past 15 years confirms the petitioners' position—that the elimination of the anti-steering rules will spur competition, increase output, foster innovation, and significantly reduce prices to both retailers and the ultimate consumer. The ARA is keenly interested in this case because many of its 7,300 member retailers transact business in both Australia and the United States and will be impacted by this Court's decision. The ARA therefore wishes to see the immense benefits to retailers, consumers, and payment card companies that are detailed in this brief expanded to the United States market.

SUMMARY OF ARGUMENT

The Australian experience dispels the Court of Appeals' supposition that American Express's ("Amex") anti-steering rules are necessary to provide rewards to cardholders or to compete with Visa and MasterCard. Between 2003 and 2005, Amex's anti-steering rules were eliminated in Australia. Since that time, Amex's merchant fees have decreased dramatically while its

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[1] No party's counsel authored this brief in whole or in part and no person or entity other than *amicus* or their counsel made a monetary contribution to the preparation or submission of this brief. All counsel of record consented to the filing of this brief.

cardholder rewards have continued to be the most lucrative of all credit cards. Further, innovation has flourished, consumer prices have decreased, credit card output has doubled (outpacing the increase in the United States), and Amex has grown its market share and become a stronger competitor to Visa and MasterCard. The Australian experience is real-world proof that elimination of anti-steering rules fosters the type of pro-growth competition envisioned by the antitrust laws.

ARGUMENT

I. THE ELIMINATION OF THE ANTI-STEERING RULES FOSTERED PRICE COMPETITION AND A DRAMATIC DROP IN AMEX'S MERCHANT FEES

In 2000, the Reserve Bank of Australia ("RBA") and the Australian Competition and Consumer Commission ("ACCC") jointly conducted a study of competition and efficiency in the Australian payment card industry. The RBA was concerned, among other things, that the anti-steering rules forced upon merchants by the payment card networks, including the no-surcharge rule,[2] "prohibited differential pricing by the merchants

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[2] Prior to the Australian reforms, the Amex anti-steering rules prohibited a merchant from either granting a discount to a consumer who uses a less-expensive payment card or imposing a charge (i.e., surcharge) on a consumer who uses the more-expensive Amex card. The grant of a discount to the less-expensive card user or the imposition of a charge on the more-expensive card user are merely different ways of expressing "differential pricing"—i.e., the price for using the more-expensive card is higher than the price for using the less-expensive card. *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1146, 1151 (2017) ("Merchants who wish to employ differential pricing

of card services that cost the merchants different amounts and suppress[ed] important signals to end-users about the cost of the credit card networks" and "limit[ed] competition, distort[ed] consumer choices and led to a misallocation of resources."[3] As the RBA explained:

> The study's view is that 'no surcharge' rules suppress price signals that guide the efficient allocation of resources. They result in cross-subsidisation of cardholders by consumers who do not use credit cards; they restrict competition between merchants by limiting the range of pricing strategies they can use; and they prevent end-users [from] exerting competitive pressures on merchant service fees and interchange fees.[4]

The study concluded that there were "no convincing reasons" to permit the no-differential-pricing rule.[5] The RBA stated that it had "no view about the 'right' mix of payment methods" and only wanted to "promote efficiency and competition in the payments system to ensure that the market does provide users and providers of payment services with appropriate price

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may do so in two ways . . . impose a surcharge . . . or offer a discount").

[3] Reserve Bank of Australia, *Payments System Board Annual Report 2000*, p. 16 (available at https://goo.gl/m75uVd).

[4] Joint Study by the RBA and ACCC, *Debit and Credit Card Schemes in Australia – A Study of Interchange Fees and Access*, Oct. 2000, p.55 (available at https://goo.gl/wxTPcG).

[5] Reserve Bank of Australia, *Payments System Board Annual Report 2000*, p. 16 (available at https://goo.gl/m75uVd).

signals on which to base their choices."[6] The RBA was concerned by "a number" of anti-steering clauses in the card acceptance agreements signed by the merchants and stated that "the relevant clauses have had the effect of reducing competition between the [payment] schemes by limiting merchants' ability to steer customers to lower-cost means of payment."[7]

In August 2002, as part of a set of comprehensive reforms, the RBA mandated that MasterCard and Visa eliminate their no-surcharge rules as of January 1, 2003. Faced with the prospect of regulatory scrutiny, Amex entered into a voluntary undertaking with the RBA to do the same.[8] Two years later,[9] Amex agreed to remove its other anti-steering rules. As a result of the elimination of the anti-steering rules, merchants in Australia had "the option of asking a customer who offers a charge card whether they would be prepared to pay with another card or another

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[6] Reserve Bank of Australia, *Payments System Board Annual Report 2002*, p.13 (available at https://goo.gl/cLh6Ju).

[7] Reserve Bank of Australia, *Media Release Number 2005-02*, Feb. 24, 2005 (available at https://goo.gl/Jr1mrD).

[8] Reserve Bank of Australia, *Reform of Credit Card Schemes in Australia, IV – Final Reforms and Regulation Impact Statement*, Attachment 4: Undertakings from the Three Party Schemes, Aug. 2002, p.59 (available at https://goo.gl/tMfEaw). Amex updated this undertaking in line with the revised surcharging regulations introduced in March 2013. Undertaking by American Express in favour of Reserve Bank of Australia, March 18, 2013 (available at https://goo.gl/e2mF4G).

[9] Reserve Bank of Australia, *Reform of Australia's Payments System – Preliminary Conclusions of the 2007/08 Review*, April 2008, p.6 (available at https://goo.gl/4BEqeT).

method of payment with a lower cost to the merchant."[10]

A. The elimination of the anti-steering rules quickly resulted in lower merchant fees.[11]

The pro-competitive effects of the elimination of the anti-steering rules were felt immediately. In anticipation of the elimination of the anti-steering rules, Amex dropped its prices to merchants, both large and small, and has continued to price its merchant services more competitively. Prior to the elimination of its anti-steering rules, Amex's average merchant fee in Australia was greater than 2.5%.[12] Today, it is less than 1.5%—a drop in price of more than 40%.[13] Many large merchants pay less than 1%, and sometimes substantially less. And the dramatic drop in Amex's merchant fees is not limited to large merchants. In July 2017, Amex announced that "it

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[10] Reserve Bank of Australia, *Media Release Number 2005-02*, Feb. 24, 2005 (available at https://goo.gl/Jr1mrD).

[11] To aid the Court, a timeline of the events in Australia related to payment card reform and its subsequent effects can be found in Appendix A.

[12] The RBA did not begin publishing Amex's average merchant fee until March 2003, seven months after the announcement that Amex was eliminating its no-surcharge rule. The rate published by the RBA in March 2003 for Amex was 2.48%; however, Amex had already begun dropping its rates by that time. *See* Reserve Bank of Australia, *Payments Data, C3 Average Merchant Fees for Debit, Credit and Charge Cards* (available at https://goo.gl/Vs11fo).

[13] *Id.*

would lower fees for small business by [another] 1 percentage point."[14]

These reductions are a direct result of merchants' ability to differentially price credit card services so as to foster price competition.[15] First, as the then-current Governor of the RBA explained in 2005:

> I have heard that the big ones [merchants] have actually managed to negotiate big reductions with Amex. . . . The big ones and

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[14] F. Untalan, *Amex Lowers Fees for Small Businesses in Australia*, International Business Times (July 7, 2017) (explaining that "[t]he move is part of an aggressive expansion plan that seeks to double the credit card giant's Australian footprint in two years") (available at https://goo.gl/rBmKys); *see also* C. Yeates, *American Express Cuts Fees for Small Businesses to Double its Presence*, The Sydney Morning Herald (July 6, 2017) ("As it navigates major shifts in the payment landscape and competition with other providers, the credit card giant [Amex] is eyeing its biggest roll-out in Australia since it arrived in 1954.") (available at https://goo.gl/ThPTPC).

[15] The reductions in Amex's charges are not tied to regulation of interchange fees. The interchange fee is a component of Visa and MasterCard's merchant fees. The RBA regulated the interchange fees, resulting in an average reduction of approximately 45 basis points in interchange, from 95 bps to 50 bps. But the Amex average merchant fee dropped more than 100 bps, and its fees to large merchants dropped even more, even though Amex's fees were not regulated. The trend and timing of the reductions of Amex's merchant fees show no correlation with the timing of the regulated reduction of Visa and MasterCard interchange fees; indeed, Amex merchant fees have continued to substantially decrease in the past few years despite the stabilization of Visa and MasterCard interchange fees more than a decade ago. Furthermore, if merchants could not tell the consumers of the lower-cost MasterCard and Visa cards and steer them to use those cards, no one would switch to the lower-cost cards, and Amex would lose no sales volume and have no reason to compete on price by lowering its merchant fees.

> then the smaller ones have got these powers now to say, 'I will not take your card' or 'I will take your card and I'll surcharge if your fees are too high' or 'I will steer people towards lower cost means of payments.' By giving them that power they have been able to negotiate lower fees. That is how the system is meant to work. I suspect in the long run, when the merchants realise what power they have got, and particularly when they start talking to each other, they will start to exercise it. At the moment they are so defeatist because they have been tied down by 30 years of restricted covenants that have prevented them from using the powers that they really should have had.[16]

Second, a comprehensive review of the Australian payment system by the RBA in 2007-2008 to evaluate the effects of eliminating the anti-steering rules found that the reforms had "met their main objectives" of "improving price signals in the Australian payments system; increasing transparency; improving access; and creating a more soundly based competitive environment."[17] The RBA review found that differential pricing of credit cards according to their cost to the merchant was having the intended result of moving consumers to lower-cost payment methods. For example, "[c]onfidential data from one card scheme

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[16] Ian Macfarlane (Governor of the RBA) to the House of Representatives Standing Committee on Economics, Finance and Public Administration, Official Committee Hansard, Aug. 12, 2005, at p. EFPA 30 (available at https://goo.gl/wsaqwQ).

[17] Reserve Bank of Australia, *Reform of Australia's Payments System – Conclusions of the 2007/08 Review*, Sept. 2008, p.6 (available at https://goo.gl/2BvS4o).

indicate that when surcharges are imposed on a particular type of card, use of that card declines substantially."[18] Moreover, the comprehensive review found that differential pricing by merchants was putting competitive pressure on Amex's rates and that the benefit from the elimination of the anti-steering rules "ha[d] been substantial."[19]

Further, the RBA held a conference as part of the comprehensive review in which representatives from credit card networks, issuers, acquirers, merchants, economists, and industry experts, both local and from around the world, discussed differential pricing and steering. At the conference, "[a] number of participants commented that merchants now have greater bargaining power in negotiations with acquirers. . . . It was also noted that the reforms provide merchants with more freedom to negotiate lower fees with American Express."[20]

B. Studies confirm that the elimination of the anti-steering rules has improved competitive dynamics and the Australian economy overall.

The RBA has continued to study the effects of the elimination of the anti-steering rules and continues to

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[18] Reserve Bank of Australia *Reform of Australia's Payments System – Preliminary Conclusions of the 2007/08 Review*, April 2008, p.18 (noting that "[w]here merchants have imposed a surcharge on one scheme only, or imposed a higher surcharge on one scheme than another, there have been large shifts in payment patterns away from the scheme with higher surcharges") (available at https://goo.gl/4BEqeT).

[19] *Id.* at p.26.

[20] Reserve Bank of Australia, *Proceedings of Payments System Review Conference Held in Sydney on 29 November 2007*, April 2008, p.205 (available at https://goo.gl/x96TmB).

find pro-competitive benefits. In June 2008, the RBA observed that differential pricing by merchants "has clearly promoted better price signals in the payments system."[21] In September 2008, the RBA found that there have been substantial benefits from the removal of the anti-steering rules, including "improving the competitive dynamics and price signals in the payments system."[22]

In June 2011, the RBA again concluded that the pro-competitive benefits from the anti-steering rules reforms "have been substantial."[23] Later that year, the RBA's Payments System Board explained that it was satisfied that differential pricing has been successful in achieving these benefits.[24]

An RBA review in December 2015, seven years after the comprehensive review of 2007-2008, concluded that the changes had "significantly improved competition in the Australian payments system" and "removed

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[21] Reserve Bank of Australia, *The Preliminary Conclusions of the Payments System Review – Address to the Visa Forum 2008, Hamilton Island, Queensland, Philip Lowe – Assistant Governor (Financial System)*, June 4, 2008, p.31 (available at https://goo.gl/s92EpP).

[22] Reserve Bank of Australia, *Reform of Australia's* Payments *System – Conclusions of the 2007/08 Review*, Sept. 2008, p.18 (available at https://goo.gl/2BvS4o).

[23] Reserve Bank of Australia, *Review of Card Surcharging: A Consultation Document*, June 2011, p.3 (available at https://goo.gl/j9XMkt).

[24] Reserve Bank of Australia, *A Variation to the Surcharging Standards – A Consultation Document*, Dec. 2011, p.2 (available at https://goo.gl/Yqc1TP); *see also* Reserve Bank of Australia, *A Variation to the Surcharging Standards – Final Reforms and Regulation Impact Statement*, June 2012, p.3 (available at https://goo.gl/rMBUuk).

restrictions on merchants that had weakened competition in the system."[25] The RBA also concluded that the changes had "contributed to a more efficient and competitive payments system, which has benefited the Australian economy."[26] Last year, the Payments System Board reaffirmed its view that the right of merchants to differentially price "expensive payment methods is important for payments system efficiency and helps to hold down the cost of goods and services to consumers generally."[27] As discussed further below, the RBA and others have found that the costs of goods and services to consumers in Australia have dropped significantly as a result of the more competitive pricing by the credit card networks.

C. Industry participants, including Amex, recognized the pro-competitive benefits of the reforms.

Even Amex recognizes that competition has been spurred by the elimination of the anti-steering rules. In a 2007 submission to the RBA, American Express acknowledged that "many" merchants "use the threat of surcharge to influence consumers' choice of payment method or to negotiate lower prices from a merchant acquirer."[28] The same Amex submission stated that

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[25] Reserve Bank of Australia, *Review of Card Payments Regulation – Consultation Paper*, Dec. 2015, p.2 (available at https://goo.gl/DYutTd).

[26] *Id.*

[27] Reserve Bank of Australia, *Payments System Board Annual Report 2016*, Sept. 2016, p.36 (available at https://goo.gl/RBnuaC).

[28] American Express Australia Limited, *Review of Payments System Reforms – A Submission to the Reserve Bank of Australia*, Aug. 2007, p. 9 (available at https://goo.gl/P4N5RG).

merchants benefit from the elimination of the anti-steering rules through "lower merchant service fees" and "increased bargaining power" from the ability—or the threat—to differentially price.[29]

The four largest banks in Australia have also publicly acknowledged that competition is fostered by the elimination of the anti-steering rules. ANZ Bank stated that differential pricing by merchants "increases the transparency of the costs involved, empowering consumers themselves to choose the most appropriate form of payment."[30] This sentiment was echoed by the National Australia Bank, which found differential pricing vital "in fostering competitive pressure on credit card interchange fees."[31] The Commonwealth Bank agreed, conceding that the ability of merchants to differentially price "allows merchants to impose 'downward pressure on interchange fees' and RBA data shows an increasing propensity for merchants to do this."[32] And Westpac publicly acknowledged the "significant competitive pressures" caused by merchant ability to differentially price.[33]

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[29] *Id.* at p. 21.

[30] Australia and New Zealand Banking Group Limited (ANZ), *Submission to the Reserve Bank of Australia – Reform of Australia's Payment System Issues for the 2007-08 Review*, Sept. 2007, p.4 (available at https://goo.gl/Tzdfo8).

[31] National Australia Bank, *Submission to the Reserve Bank of Australia – Reform of Australia's Payments System*, June 2008, p.2 (available at https://goo.gl/MR2QZF).

[32] Commonwealth Bank of Australia, *Submission to the Reserve Bank of Australia – Reform of Australia's Payments System*, June 2008, p.4 (available at https://goo.gl/tR7fzL).

[33] Westpac Banking Corporation, *Submission to the Reserve Bank of Australia – Reform of Australia's Payments System*, June 2008, p.1 (available at https://goo.gl/LeyRKN).

MasterCard, too, has acknowledged the pro-competitive results of the reforms, explaining that "it is now clear that merchants do have and do exercise significant power when it comes to the determination of merchant fees" as a result of the "various tools at their disposal" with the elimination of the anti-steering rules.[34] MasterCard noted that "[s]ome merchants have forced down their effective interchange fee to 0.30 per cent [i.e., 30 bps]."[35]

D. Woolworths provides a case study of competition in action.

Woolworths, Australia's largest retailer, is an example of a large merchant that used competitive forces to drive down its credit card fees. By threatening to differentially price more expensive credit cards, Woolworths substantially reduced the prices it pays to all of the major credit card companies. Woolworths explained that this reduction of fees to a competitive level was possible only because of the elimination of Amex's anti-steering rules:

> [T]he intention to surcharge has been one of Woolworths' single most effective pricing negotiation tool[s] for the domestic and international card schemes. This has assisted Woolworths' brands, which undertake 18% of all debit transactions and 12% of all credit card transactions in Australia, in not introducing surcharging currently. In certain brands we have achieved an almost 50%

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[34] Reserve Bank of Australia, *Proceedings of Payments System Review Conference held in Sydney on 29 November 2007*, April 2008, pp.195-196 (available at https://goo.gl/x96TmB).

[35] *Id.* at p.196.

> reduction in pricing, allowing us in the current economic and highly competitive environment to provide our customers with better value.[36]

As the Woolworths example demonstrates, the vast majority of merchants in Australia have not even had to engage in actual differential pricing; just the ability to differentially price has reduced merchant fees to a competitive level.[37]

This competitive dynamic is illustrated by another of the larger Australian retailers who confidentially shared with the ARA the details of how it was able to use the ability to differentially price to negotiate with Amex. This retailer told Amex that it would begin imposing differential pricing on card transactions if Amex did not reduce its rates to competitive levels. On the Thursday before the week the retailer was to begin differential pricing, Amex relented and reduced its rates to competitive levels to avoid differential pricing. This is yet another example of how the mere ability of merchants to differentially price injects price competition into the credit card industry and forces Amex's merchant fees down to competitive levels.

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[36] Ltr. from Dhun Karai (Woolworths Limited) to Chris Kent (Payments Policy Department for the RBA), July 25, 2011 (available at https://goo.gl/ybYNuP).

[37] Because merchants have succeeded in raising the threat of differential pricing to reduce merchant fees to a competitive level, the frequency of surcharges on card transactions is quite low. *See* Reserve Bank of Australia, *Research Discussion Paper: How Australians Pay: Evidence from the 2016 Consumer Payments Survey*, at p.14 (available at https://goo.gl/zBKxkQ). For example, in 2016, consumers paid a surcharge on a mere 3.5% of all card payments, and the median value of surcharges is only 1.0 percent. *Id.*

E. Lower merchant fees have led to hundreds of billions of dollars of savings to merchants (and consumers).

The economic impact of lower merchant fees fostered by competition has been substantial. The RBA has estimated that merchants (and, hence, consumers) saved at least $15 billion AUD ($11 billion USD) from 2004-2015, based on pre-reform merchant rates. Had merchant fees risen at the same rate as they did in the United States over this period, the savings would have been at least $20 billion AUD ($15 billion USD).[38] By comparison, if these same figures were extrapolated to the larger U.S. market, the savings to merchants and consumers would be a staggering $150 billion USD. Factoring in the increased merchant fees in the United States since that time, the savings would be over $210 billion USD.

Further, given the relative starting points of merchant fees in both countries in 2003, these amounts likely *underestimate* the potential savings in the United States—perhaps by several orders of magnitude. Nonetheless, they provide a rough estimate of what could occur in the United States if credit card networks were no longer able to insulate themselves from competition on merchant fees.

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[38] Reserve Bank of Australia, *Review of Card Payments Regulation – Conclusions Paper*, May 2016, pp.8-9 (available at https://goo.gl/fXAQcf).

II. OUTPUT, INNOVATION, CONSUMERS, AND EVEN AMEX HAVE BENEFITED IN AUSTRALIA

The forces of competition spurred by the removal of the anti-steering rules in Australia have not only led to more competitive merchant fees, but also have increased payment card output, spurred innovation, reduced consumer retail prices, and even benefited Amex.

A. Competition has increased output.

Since the anti-steering rules were eliminated, the Australian credit card market has grown substantially. In fact, non-cash payments (of which cards account for more than two-thirds of transactions) have grown more in Australia than in the United States. According to the 2016 World Payments Report, the Compound Annual Growth Rate for the United States was 4.0% for 2010-2013 and 3.3% for 2013-2014. The corresponding growth rates for Australia are 7.3% and 6.4%.[39] Thus, output has grown at almost twice the rate in Australia as it has in the United States.

B. Competition has spurred innovation.

Innovation has also flourished in Australia after the removal of the anti-steering rules and attendant reductions in merchant fees. "For example, MasterCard and Visa have introduced chip cards and PIN authorisation at the [point of sale], and are now rapidly rolling out contactless payments considered to be among the more effective rollouts globally."[40] All of the

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[39] *2016 World Payments Report*, Joint Report by Capgemini and BNP Paribas, p.8 (available at https://goo.gl/sRLY1E).

[40] Bank for International Settlements, *Innovations in Retail Payments, Report of the Working Group on Innovations in Retail*

payment networks have developed innovative ways "to increase incentives for card issuers to promote particular products within their suite of offers," and card issuers "have responded, particularly through new strategies focusing on the premium segment of the market."[41]

One particularly important benefit is how the elimination of the anti-steering rules has allowed merchants to play an increased role in payment innovation. Many of the major innovations have required significant investment by merchants, particularly large merchants, and the payment networks, having realized the role merchants play in innovation, often offer lower merchant fees to encourage merchants to participate in such innovation. Just a few examples of the innovation in the Australian payments market since 2003 include:

- Issuance of Amex "companion" cards;[42]
- No-frills and low-interest credit cards;

Payments, Committee on Payment and Settlement Systems, May 2012, p.45 (available at https://goo.gl/RGJJYa).

[41] I. Chan et al., Reserve Bank of Australia, *The Personal Credit Card Market in Australia: Pricing over the Past Decade*, RBA Bulletin March Quarter 2012, pp.55-56 (available at https://goo.gl/xeVMrV).

[42] In Australia, a companion card is a credit card account issued by a bank that can be run on either the Amex or the Visa/MasterCard networks. A cardholder might choose to run the account as an Amex, for example, to get more points or run the account as a Visa if a merchant imposes a surcharge on Amex or refuses to accept Amex. This is a prime example of an innovative product available in Australia but not in the United States that emerged because Australia removed the anti-steering rules. *See, e.g.*, A. Bradney-George, *Companion Credit Cards*, Finder (Oct. 23, 2017) (available at https://goo.gl/XwYfJW).

- Contactless payment systems, such as Visa PayWave and MasterCard PayPass;
- The Community of Interest Network (COIN);[43]
- Formation of Electronic Funds Transfer at Point of Sale (EFTPOS) as a card scheme in 2009 (EFTPOS Payments Australia Limited, commonly known as EPAL). EPAL has implemented many new innovations such as contactless cards and is currently developing card-not-present and mobile products;
- New online systems such as Payclick by Visa, Paymate,[44] PayPal, and POLi,[45] and
- Many other innovations, some of which are detailed in Appendix B.

In summary, innovation has flourished in Australia after the elimination of the payment networks' anti-steering rules, resulting in the launch of a raft of innovative new products into the Australian market to

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[43] In February 2010, the Australian payments industry established a new communication "network cloud," called the Community of Interest Network (COIN), to facilitate the exchange of low-value payments. COIN replaces the bilateral communication links that supported the exchange of direct entry and other low-value payments between service providers in Australia such as the bilateral EFTPOS links. It is operated by the Australian Payments Clearing Association.

[44] Paymate is an Australian company specializing in providing an online payment gateway system for individuals and small businesses in Australia.

[45] POLi is an online payment system. It enables consumers to pay for goods or services directly from a merchant's website without the need for a credit card, but by using a direct connection to the user's internet banking. It links to all the major Australian and New Zealand banks.

accompany the lower merchant fees, increased payment card output, and lower consumer prices. If the anti-steering rules are removed, many of these same innovations—and the concomitant benefits for merchants and consumers—would likely become available in the United States.

C. Competition has benefited consumers.

Consumers as a whole have benefited from the elimination of the anti-steering rules in Australia. The RBA has consistently concluded that the reforms have led to lower merchant fees, which have in turn led to lower prices for consumers. As early as 2005, Philip Lowe, then-Assistant Governor (and currently Governor) of the RBA, explained that the impact on prices due to lower merchant fees was so significant that it had lowered the country's overall Consumer Price Index.[46]

The Australian House of Representatives Standing Committee on Economics, Finance and Public Administration reached the same conclusion.[47] In 2008, the RBA undertook a comprehensive study of the Australian credit card market and found that "the bulk of these savings [from lower merchant fees] have been, or will eventually be, passed through into

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[46] P. Lowe, Assistant Governor (Financial System), Reserve Bank of Australia, *Reform of the Payments System – Address to Visa International Australia and New Zealand Member Forum*, Mar. 2, 2005 (available at https://goo.gl/sybkBc). Mr. Lowe is now Governor of the RBA.

[47] House of Representatives Standing Committee on Economics, Finance and Public Administration, *Review of the Reserve Bank of Australia and Payments System Board Annual Reports 2005 (First Report)*, June 2006, p. iv. (available at https://goo.gl/sDHPzd).

savings to consumers."[48] The RBA explained that its judgment was "consistent with standard economic analysis which suggests that, ultimately, changes in business costs are reflected in the prices that businesses charge."[49]

The assessments by the RBA repeatedly show benefits to consumers. "RBA's assessment [in 2008] of the reforms' effects on overall welfare [was] positive and it estimate[d] that welfare gains [were] likely substantial."[50] In 2015, the RBA determined that "the costs involved in providing payment services to households [had] fallen from 0.80 per cent of GDP in 2006 to 0.54 per cent of GDP in 2013."[51] For perspective, household savings of 0.26 percent of GDP in the United States would equate to $48 billion annually.

Importantly, these benefits to consumers have often gone to those most in need. The RBA believes that competition has reduced cross-subsidization of credit cardholders by those using other payment methods, including subsidization of high-end credit cardholders

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[48] Reserve Bank of Australia, *Reform of Australia's Payments System – Preliminary Conclusions of the 2007/08 Review*, April 2008, p. 23 (available at https://goo.gl/2bhuzZ).

[49] *Id.*

[50] Government Accountability Office, USA, *Credit And Debit Cards: Federal Entities Are Taking Actions to Limit Their Interchange Fees, but Additional Revenue Collection Cost Savings May Exist, GAO-08-558*, May 2008, p. 36 (available at https://goo.gl/vz8WhU).

[51] Reserve Bank of Australia, *Review of Card Payments Regulation – Issues Paper*, March 2015, p.24 (available at https://goo.gl/iQdDNM).

by low-cost credit cardholders.[52] When it reviewed the impact of the card payment regulations in 2016, the RBA concluded that changes caused by the regulations would result in "less cross-subsidisation/price discrimination between different types of cardholders and consumers, as well as between preferred and non-preferred merchants."[53]

As Australia's major consumer group explained, a return to the anti-steering rules "would shift the costs from consumers who choose a specific payment type to all consumers, as costs are absorbed into the overall price of goods and services. Such a change would disadvantage consumers using lower cost payment methods like eftpos [electronic funds transfer at point of sale] or cash while subsidising users of higher cost credit cards."[54]

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[52] The RBA has found it appropriate to ensure that differential pricing reflected actual merchant costs, consistent with the original intent of improving transparency and price signals. Reserve Bank of Australia, *A Variation to the Surcharging Standards – Final Reforms and Regulation Impact Statement*, June 2012 (available at https://goo.gl/rMBUuk); *see also* Reserve Bank of Australia, *Guidance Note – Interpretation of the Surcharging Standards*, Nov. 2012 (providing list of costs for purposes of calculating cost of acceptance) (available at https://goo.gl/JRnfVq).

[53] Reserve Bank of Australia, *Review of Card Payments Regulation – Conclusions Paper*, May 2016, p.47 (available at https://goo.gl/fXAQcf).

[54] Choice (the Australian Consumers' Association), *Review of Card Payments Regulation – Submission to the Reserve Bank of Australia*, May 2015, p.4 (available at https://goo.gl/7fbWKo); *see also* Financial System Inquiry, Commonwealth of Australia, *Final Report*, Nov. 2014, p.175 ("The Inquiry agrees with the RBA that surcharging can improve the efficiency of the payments system by providing accurate price signals to customers. In

D. Competition has even benefited Amex.

Because output has grown so substantially, even Amex has benefited with both increased card spend and an increasing number of transactions. Spend for the overall Australian credit card market has increased approximately 150%, but spend on Amex cards in Australia over the same time period has increased by over 200%.[55] Likewise, the number of Amex transactions in Australia has increased by over 200%, which also outpaced growth in the overall credit card market.[56] Indeed, Amex has grown faster in Australia since the elimination of the anti-steering rules than credit cards have grown in the United States,[57] and because of its increased output, Amex's market share in Australia has increased from 13.8% to 19% between 2002 and 2016.[58] In sum, the Australia experiment's effect on Amex is one of the

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addition, some consumer groups, such as Choice, acknowledge that accurate surcharging can provide positive outcomes.") (available at https://goo.gl/h94LWJ).

[55] Reserve Bank of Australia, *Payments Data* (available at https://goo.gl/Vs11fo).

[56] Reserve Bank of Australia, *Payments Data* (available at https://goo.gl/Vs11fo).

[57] Based on the payments data from Australia, *see id.*, total spend increase in Australia on Amex from 2003 to 2012 outpaced the growth in overall credit spend in the United States. *See* Federal Reserve System, *The 2013 Federal Reserve Payments Study – Recent and Long-Term Payment Trends in the United States: 2000–2012, Summary Report and Initial Data Release*, July 2014, pp.14-15 (available at https://goo.gl/XHgTx2).

[58] Reserve Bank of Australia, *Payments Data, C2: Market Shares of Credit and Charge Card Schemes* (available at https://goo.gl/Vs11fo).

best real-world examples of how competition benefits all involved, including competitors.

Remarkably, although the rate paid to Amex by merchants decreased by approximately 40%, Amex has been able to achieve this stellar growth while holding constant its cardholder "rewards." In fact, the anecdotal evidence suggests that Amex has actually increased its reward levels in response to differential pricing. Amex's rewards programs remain the most lucrative in Australia. In October 2016, a service called Mozo published its list of the seven most lucrative rewards credit cards of 2016 in Australia. Of the seven cards, three were Amex proprietary cards (three of the four top ranked cards, including the top-ranked card), another two included Amex companion cards, and only two were not connected to Amex.[59]

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The experience of the last fourteen years in Australia demonstrates what can happen when anticompetitive restraints, such as the credit card networks' anti-steering rules, are removed and payment card networks must compete with one another on price and quality. Although we do not profess to know the intricacies of the U.S. market as well as we know the Australian market, similarities between those markets suggest that the Australian experience is an informative benchmark. Both countries are highly dependent on payment cards, as payment cards are the most frequently used payment method in both the United States and Australia, surpassing cash and

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[59] R. Elley, *The 7 Best Rewards Credit Cards of 2016 in Australia*, Mozo (Jan. 2017) (available at https://goo.gl/yu6Fe6). Mozo is an award-winning website that allows consumers to compare banking and insurance products in Australia.

all other payment forms combined.[60] And the mix of credit to debit cards is remarkably similar, with both countries having approximately 24% of non-cash retail payments (on a per capita basis) on credit cards with around 45% on debit cards (46% in Australia vs. 44% in United States).[61]

Likewise, the Australian banking system is very similar to its counterpart in the United States. The major Australian and U.S. banks are ranked first and second among the most profitable banks in global advanced economies according to the 2016 Annual Report of the Bank for International Settlements.[62] Major banks from the United States and Australia were also ranked first and second respectively in 2002, the year before the reforms were introduced in Australia.[63]

In light of the similarities between the countries, it would appear that the Australian experience serves well as a "natural experiment" against which to test various theories and concerns, including those raised by the Court of Appeals, and Amex.

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[60] Australian Payments Network, *Annual Review 2017*, at 4 (available at https://goo.gl/G4NZEk).

[61] Reserve Bank of Australia, *Payments System Board Annual Report 2016*, at 27 (available at https://goo.gl/RBnuaC).

[62] Bank for International Settlements, *86th Annual Report (2016)*, June 2016, p.107 (available at https://goo.gl/sRZ8B5). The Bank for International Settlements defines the advanced economies as Australia, Canada, Denmark, the Euro area, Japan, New Zealand, Norway, Sweden, Switzerland, the United Kingdom, and the United States.

[63] Bank for International Settlements, *74th Annual Report (2004)*, June 2004, p.123 (available at https://goo.gl/EvpcpQ).

CONCLUSION

Australian merchants and consumers have experienced firsthand the pro-competitive benefits of the elimination of credit card anti-steering rules. Today, Australian merchants, consumers, and even credit card networks are substantially better off as a result of the competition spurred by the elimination of the restrictive restraints previously imposed by credit card networks such as Amex. We are not aware of any reason why the U.S. market would not experience similar benefits if this Court affirms the district court's opinion finding Amex's merchant restraints anticompetitive.

Respectfully submitted,

ROBERT N. KAPLAN
Counsel of Record
KAPLAN FOX & KILSHEIMER LLP
850 Third Avenue, 14th Floor
New York, NY 10022
(212) 687-1980
rkaplan@kaplanfox.com

Counsel for Amicus Curiae

December 14, 2017

APPENDIX

APPENDIX A

Timeline of Relevant Events

2000: The Reserve Bank of Australia and Australian Competition and Consumer Commission conduct a study of competition in the payment card industry and determine that there is no pro-competitive basis for permitting continuation of the anti-steering rules.

August 2002: The RBA mandates that Visa and MasterCard eliminate their no-surcharge rules.

2003: Amex voluntarily agrees to remove its no-surcharge rule.

2005: Amex voluntarily agrees to remove its remaining anti-steering rules.

March 2005: Philip Lowe, then-Assistant Governor of the RBA (and now Governor), finds that payment card reforms have led to a reduction in Australia's Consumer Price Index of 0.1 to 0.2 percent.

2008: The four largest banks in Australia acknowledge that reforms to the payment card industry have led to reduced prices.

April 2008: The RBA releases the results of a comprehensive review conducted during 2007 and 2008. The review concludes that the reforms to the payment card industry removing the anti-steering rules have increased competition and led to many positive results, including decreased merchant fees that have in turn been passed to consumers in the form of savings.

June and September 2008: Follow-on studies by the RBA confirm continued improvement in price signals and competition in the payment card industry as a result of the reforms.

2009: The EFTPOS card scheme is formed.

2010: COIN is established.

June and December 2011: Additional studies by the RBA again conclude that payment card reform's "benefits . . . have been substantial" and that consumer prices are falling.

2012: The RBA finds that consumers are responding to payment card reforms by avoiding surcharges.

May 2015: The RBA issues a study concluding that the percentage of GDP comprised of payment card fees was reduced from 0.80 percent to 0.54 percent between 2006 and 2013.

December 2015: Another RBA study again confirms the benefits of payment card reform.

2016: The RBA finds that Amex's spend and number of transactions have increased by over 200% since 2002 and that Amex's market share in Australia has increased from 13.8% to 19% between 2002 and 2016.

May 2016: The RBA concludes that because of payment card reform, there is less cross-subsidization such that consumers with less means are no longer subsidizing the rewards of more affluent consumers.

October 2016: The consumer website Mozo publishes a list of the most lucrative rewards cards in Australia. Five of the seven cards are either Amex exclusive or Amex companion cards.

July 2017: Amex announces that it will reduce fees for small business by an additional full percentage point.

APPENDIX B

In addition to the examples noted in the text of the brief, some other examples of innovation in the payment card industry in Australia following removal of the anti-steering rules include:

- Entry of new payments organizations with innovative programs—for example, Tyro entered the market as the first acquirer-only organization using a new Internet-based processing model. Tyro also developed an innovative approach to Medicare Easyclaim by integrating it with medical practice management systems.
- The New Payments Platform (NPP), which will provide a new national infrastructure allowing the ability to make and receive real-time retail payments, make and receive payments outside normal banking hours, send more explanatory information with a payment, and send payments without having to use full Bank State Branch (BSB) and account number details. The NPP will be open access infrastructure and the intention is that all ADIs will connect to the NPP, either directly or indirectly through another member. The NPP's multi-layered infrastructure has been designed to promote competition and drive innovation in payment services.[1]
- Triple DES security on PIN Pads.
- PCI DSS and PCI PED security programs.

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[1] Reserve Bank of Australia, *Payments System Board Annual Report 2016*, p.1 (available at https://goo.gl/s5GRyk).

- PIN authorization at the point of sale for credit and debit cards.
- Open loop prepaid cards.
- Closed loop prepaid cards, such as gift cards processed over the EFTPOS network.
- Electronic Benefits Transfer (EBT), such as BasicsCard.[2]
- Medicare Easyclaim.[3]
- Mobile payments, including standalone payments apps (such as Apple Pay (launched in conjunction with American Express), Cash by Optus, Samsung Pay and proprietary bank-specific Apps such as ANZ Mobile Pay, Commonwealth Bank's Tap and Pay, NAB Pay and Westpac's Tap and Pay) and integrated payment apps (like Uber and "Beat The Q"[4] that provide a provide a seamless mobile process for ordering, payment and delivery).

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[2] The BasicsCard is a Federal Government program that prevents cardholders from using their welfare payments on certain prohibited goods (such as alcohol, tobacco, pornography, and gambling). It is a PIN-protected card that allows cardholders to access their income-managed money through EFTPOS facilities at approved stores and businesses.

[3] Medicare is Australia's universal health care system, which is operated by the Federal Government. Medicare Easyclaim allows patients to claim their Medicare benefit and have it paid into their bank account through their healthcare provider's EFTPOS terminal and receive immediate reimbursement to their bank account in real time.

[4] "Beat the Q" is a mobile phone app that allows the consumer to find cafes, view menus, order coffee and food, and pay before they arrive.

- Mass-market adoption of Internet banking and Internet bill payment such as BPay.
- Internet Protocol (IP) based card terminals.
- Independent certification body for secure devices.
- Transport ticketing using contactless smart cards.
- Fast Settlement Service (FSS), which was developed by the RBA to facilitate the final and irrevocable settlement of each individual payment arising in the New Payments Platform, 24 hours a day, 7 days a week.

Formation of Australian Payments Council (APC) and the Payments Consultation Group (PCG).[5] The formation of both groups emanated from the RBA's Strategic Review of Innovation in the Payments System in order to facilitate better co-operation in identifying and implementing innovations in the payment industry in Australia.

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[5] The APC comprises organizations from the payments industry such as financial institutions, payment networks, and other payment and service providers. The PCG consists of end users such as merchants and consumer groups.

No. 16-1454

IN THE

Supreme Court of the United States

STATE OF OHIO, ET AL.,
Petitioners,

v.

AMERICAN EXPRESS COMPANY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE AUSTRALIAN TAXPAYERS' ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

KENNETH E. LEE
Counsel of Record
TEENA-ANN V. SANKOORIKAL
DYLAN A. STERN
LEVINE LEE LLP
650 Fifth Avenue, 13th Floor
New York, NY 10019
(212) 223-4400
klee@levinelee.com

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE

The Australian Taxpayers' Alliance ("ATA") is a non-profit, grassroots advocacy and activist organization composed of over 25,000 members committed to limited government and a market-based approach to economics in Australia.[1] Since its founding in 2012, the ATA has opposed the increasing interference of the Reserve Bank of Australia ("RBA") in the credit card industry, believing that such activity undermines efficiency and competition in the market and has adverse effects on consumer welfare. In light of the submission of the Australian Retailers Association ("ARA"), which misleadingly describes the RBA's credit card regulations and their effects on the Australian economy, the ATA is interested not only in correcting the record, but also in ensuring that the sorts of practices endorsed by the ARA are not enacted in other jurisdictions, including the United States. Further, given the ATA's clear and longstanding commitment to limiting governmental regulation, the ATA is interested in the United States continuing to serve as a model for the use of market-driven solutions in industry and commerce.

SUMMARY OF ARGUMENT

In this case, the ARA has taken a simple but misleading position: elimination of anti-steering rules formerly imposed by companies like American Express ("Amex") has immensely benefited merchants and

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[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the Australian Taxpayers' Alliance or its members made any monetary contribution to the preparation or submission of the brief. The parties have consented to this filing.

consumers in Australia, and it will do the same in the United States. This position is fundamentally flawed.

First, the effects of the RBA's regulations, including the elimination of anti-steering rules, have been devastating for Australian consumers. While merchants have benefited significantly from these regulations—as the RBA intended—there is no evidence that merchants have passed any savings on to consumers, even while cardholders experience increased costs and reduced benefits. Moreover, this sort of regulation—designed to drive consumers toward certain payment options—stifles, rather than enhances, competition.

Second, the credit card industry is highly regulated in Australia, and elimination of anti-steering rules was only a part of the broad system of regulations imposed by the RBA. Even assuming some positive impact, the effects of the elimination of anti-steering provisions cannot be separated from the other measures imposed by the RBA, particularly the hard cap on interchange fees that was the centerpiece of the RBA's regulations.

Third, the credit card industries in Australia and the United States are so fundamentally different that the reaction of one jurisdiction to a reform measure—such as the elimination of anti-steering rules—is not an accurate predictor of the reaction in the other. The stark differences between these two jurisdictions has been acknowledged throughout this litigation and by independent observers, and the ARA's attempt to obscure this fact should not be condoned.

ARGUMENT

I. AUSTRALIA'S REGULATION OF THE CREDIT CARD INDUSTRY HAS HARMED CONSUMERS AND COMPETITION

The ARA paints an unnaturally sanguine picture of the impact the RBA's regulations, including the elimination of anti-steering rules, have had on consumers. In fact, consumers have experienced a variety of costs since the enactment of the regulations. Such costs are an unfortunate but inevitable consequence of imposing a system that is, at its core, contrary to Western free-market ideals.

A. Australian Consumers Have Experienced Significant Costs That Are Likely to Continue

The ARA insists that the decline of merchant fees resulting from the RBA's regulations has benefited consumers. For example, it claims that "[l]ower merchant fees have led to hundreds of billions of dollars of savings to merchants (and consumers)"[2] and "the reforms have led to lower merchant fees, which have in turn led to lower prices for consumers."[3] These assertions, however, are wholly conclusory, and they ignore the evidence that merchants' savings in Australia are not being passed along to consumers.[4]

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[2] Brief for the Australian Retailers Association as *Amicus Curiae* in Support of Petitioners, *Ohio v. American Express Co.*, No. 16-1454, 2017 WL 6398767 at *14 (U.S. Dec. 14, 2017) (hereinafter, "ARA Brief").

[3] *Id.* at *18.

[4] The ATA agrees with the conclusion of the U.S. Court of Appeals for the Second Circuit that the credit card market is "two-sided" and that it would be erroneous to "focus[] entirely on

To be clear, merchants have experienced a significant windfall because of the RBA's regulations. According to one analysis of the effect of the regulations in Australia, "merchants were saving approximately $676 million annually as a result of reduced fees," meaning that they have saved approximately $10 billion since 2003.[5] The major beneficiaries appear to be "very large merchants," among which surcharging is "more common" than their smaller counterparts.[6] Such a redistribution was intended: as one scholar explained, "The RBA's program is explicitly designed to improve the position of merchants."[7]

Multiple reports, however, express skepticism that the merchants' windfall was passed along to consumers. In its "Preliminary Conclusions" regarding the effects of its sweeping regulations, published in 2008, the RBA explained that "no concrete evidence has been presented to the [RBA] regarding the pass-through of

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the interests of merchants while discounting the interests of cardholders." App. 54a. In our view, "[a] correct analysis of competitive effects would [be] two-sided, considering *both* the effects on network services to merchants *and* the effects on credit card services to cardholders." Brief for J. Gregory Sidak et al. as *Amici Curiae* in Support of Defendants-Appellants, *United States v. American Express Co.*, No. 15-1672, 2015 WL 4873717, at *13 (2d Cir. Aug. 10, 2015) (emphasis in original).

[5] Tim Andrews & Aaron Lane, *Submission to the Reserve Bank of Australia's Consultation on Draft Standards for Credit Card Payments*, at 7 (Feb. 2016), *available at* https://goo.gl/wuSdf7 (hereinafter, "Andrews & Lane Submission").

[6] Reserve Bank of Australia, *Review of Surcharging: A Consultation Document*, at 2 (June 2011), *available at* https://goo.gl/cpyKyM.

[7] Richard A. Epstein, *The Regulation of Interchange Fees: Australian Fine-Tuning Gone Awry*, 2005 Colum. Bus. L. Rev. 551, 554 (2005), *available at* https://goo.gl/Pn8Kk4.

these savings."[8] That same year, the United States Government Accountability Office ("GAO") issued a report following a study of the Australian reforms and concluded that there was "no conclusive evidence" that merchants reduced prices for goods.[9] And as late as 2015, the RBA admitted that it was "impossible . . . to measure exactly how these reductions in merchant service fees have flowed through into prices for consumers."[10] Rather, the RBA—and the ARA in its brief—declare that it just "seems reasonable to assume that they have mostly flowed through to lower retail prices for customers."[11] The lack of analysis to substantiate this supposedly "reasonable assumption" is striking. As scholars have noted, "the RBA provides no reason why it would not be equally reasonable to assume that the [merchant fee reduction] flows mostly to the merchants' profit margins. Indeed, profit is something that is curiously missing from the entire RBA analysis."[12]

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[8] Reserve Bank of Australia, *Reform of Australia's Payments System: Preliminary Conclusions of the 2007/08 Review*, at 13 (Apr. 2008), *available at* https://goo.gl/hPXsdx (hereinafter, "RBA Preliminary Conclusions").

[9] U.S. Government Accountability Office, *Credit and Debit Cards: Federal Entities Are Taking Actions to Limit Their Interchange Fees, but Additional Revenue Collection Cost Savings May Exist* (May 2008), *available at* https://www.gao.gov/assets/280/275422.pdf (hereinafter, "GAO Report").

[10] Reserve Bank of Australia, *Review of Card Payments Regulation: Issues Paper*, at 23 (Mar. 2015), *available at* https://goo.gl/D7iadh (hereinafter, "RBA Issues Paper").

[11] *Id.*

[12] Sinclair Davidson & Jason Potts, *Australian Interchange Fee Regulation: A Regulation in Search of a Market Failure*, at 11 (Sept. 2015), *available at* https://goo.gl/r2F2DD. *See also* American Express Australia Limited, *Review of Payments System*

In contrast to the vagueness regarding consumer benefits derived from the RBA's reforms, the costs that cardholders have experienced are clear. Evaluating the impacts of the RBA's reforms in 2008, one analysis found:

> Cardholders are paying more for their cards. Between 2002 and 2008, the RBA estimates that the average payment card fee rose by $40 per account, indicating that (with 12 million accounts held in 2008) cardholders are paying $480 million more to hold their cards than they did before the regulations took effect in 2003.[13]

The analysis further concluded that "no evidence has been presented that would allow one to conclude that the undeniable losses to cardholders have been offset by reductions in retail prices or improvements in the quality of retail service."[14] The GAO reached a similar conclusion, finding that "some costs for card users, such as annual and other fees, have increased" in the wake of the implementation of regulations like the removal of anti-steering rules.[15] Thus, independent analyses recognize that the gains merchants have

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Reforms – A Submission to the Reserve Bank of Australia, at 9 (Aug. 2007), *available at* https://goo.gl/P4N5RG (hereinafter "Amex RBA Submission") (cited in ARA Brief, at *10 nn.28 & 29) (noting that the "new independent line of revenue from surcharging profits [did not] appear[] to be passed on to consumers").

[13] Andrews & Lane Submission, at 6 (citing Robert Stillman, William Bishop, Kyla Malcolm & Nicole Hildebrandt, *Regulatory Intervention in the Payment Card Industry by the Reserve Bank of Australia*, CRA International, at 13 (Apr. 28, 2008), *available at* https://goo.gl/aBcPmz).

[14] Stillman, et al., *Regulatory Intervention*, at 33.

[15] *See* GAO Report.

experienced as a result of credit card regulation have not made their way to cardholders.

This is consistent with what occurred in the United States following the imposition of debit card interchange fee caps.[16] Passed to "address the rise of debit card fees,"[17] this legislation limited debit cards fees to "the sum of (1) 21 cents and; (2) 5 basis points multiplied by the value of the transaction."[18] Analyzing the effect of these regulations and the resulting gains to merchants, one set of scholars concluded:

> There is no reason to believe that merchants would give this windfall back to consumers . . . . A wealth of economic studies shows that does not happen in the real world. Consumers got the short end of the stick though. Merchant[s] are not giving enough of their gains back to consumers to compensate for the higher fees and reduced services that consumers are getting from banks as a result of the interchange price caps, nor, as we have shown, are merchants expected to do so.[19]

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[16] *See* 12 C.F.R. § 235. "An interchange fee is, to put it at its simplest, a fee paid by a merchant when the customer uses a credit or debit card to purchase goods or services." Andrews & Lane Submission, at 3.

[17] *NACS v. Bd. of Governors of Fed. Reserve Sys.*, 958 F. Supp. 2d 85, 90 (D.D.C. 2013), *rev'd on other grounds*, 746 F.3d 474 (D.C. Cir. 2014).

[18] 12 C.F.R. § 235.3(b)(1)-(2).

[19] David S. Evans, Howard H. Chang & Steven Joyce, *The Impact of the U.S. Debit Card Interchange Fee Caps on Consumer Welfare: An Event Study Analysis*, Coase-Sandor Institute for Law & Economics, at 49 (2013), *available at* https://goo.gl/QkDvzz.

Indeed, while the "goal" of this legislation "was to lower merchants' costs of accepting debit cards and to pass along the cost savings to consumers in terms of reduced prices," a survey of 420 merchants found that "[t]he majority of respondents (75 percent) reported no price change," and "[f]or those who had a price change, 11 times more (23 percent over 2 percent) reported price hikes [rather] than cuts."[20] Ultimately, United States consumers "lost, on net, about $22 billion to $25 billion" from the enactment of debit card fee caps.[21] There were other collateral consequences for consumers as well, such as a sharp decrease in the availability of free checking accounts.[22] Given this experience with card regulation in the United States, as well as the rise of consumer costs in Australia, it stands to reason that elimination of anti-steering rules would harm American cardholders.

In addition to these costs, when merchants have been granted the ability to steer consumers, they have done so through exorbitant surcharges, making an additional profit at consumers' expense.[23] The RBA

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[20] Zhu Wang, Scarlett Schwartz & Neil Mitchell, *The Impact of the Durbin Amendment on Merchants: A Survey Study*, 100 Economic Quarterly 183, 185-89 (2014), *available at* https://goo.gl/C1AQkf.

[21] Evans, et al., *The Impact of the U.S. Debit Card Interchange Fee Caps*, at 49.

[22] *See* Mark D. Manuszak & Krzysztof Wozniak, *The Impact of Price Controls in Two-sided Markets: Evidence from US Debit Card Interchange Fee Regulation*, Federal Reserve, at 5-6 (2017), *available at* https://goo.gl/Vp4MCK.

[23] While the ATA recognizes that Petitioners are not challenging the prohibition on merchants imposing fees when accepting Amex cards, *see* App. 96a, given the private challenges to no-surcharge provisions, *see id.*, and the close relationship those rules have with anti-steering provisions, the ATA wanted

reported that "some merchants may be using surcharging as an additional means of generating revenue, rather than simply covering the costs of card acceptance," and "there are certain industries or payment channels where surcharging well in excess of merchant service fees is quite common."[24] The RBA found that the "increasingly widespread nature" of surcharge abuse had "the potential to distort price signals to cardholders."[25] As one Australian government official put it, "Consumers are outraged at the exorbitant fees and charges some companies make them pay when buying goods and services with their credit cards."[26] Furthermore, the regulations "promoted an environment where consumers have no protection against profiteering except to decline to proceed with a purchase, which may often be impracticable where time is pressing or an alternative merchant is not readily available."[27]

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to highlight the significant problems differential surcharging has presented in Australia.

[24] Reserve Bank of Australia, *A Variation to the Surcharging Standards: Final Reforms and Regulation Impact Statement*, at 4-5 (June 2012), *available at* https://goo.gl/LsWwE7.

[25] Reserve Bank of Australia, *Review of Card Surcharging: A Consultation Document*, at 1 (2011) *available at* https://goo.gl/fxf7bP. *See also* Marc Rysman & Julian Wright, *The Economics of Payment Cards*, at 14 (Nov. 2012), *available at* https://goo.gl/DAECC5 (noting that in Australia, "of the merchants that do surcharge, the *average* surcharge is around twice that of the merchant fee they face, and this average surcharge has increased even while merchant fees have decreased" (emphasis in original)).

[26] Press Release, David Bradbury, *Outing Credit Card Fee Gougers*, Australian Treasury (May 29, 2013), *available at* https://goo.gl/XU2yYj.

[27] Amex RBA Submission, at 10.

Faced with this pervasive problem of its own making, the RBA imposed additional regulations designed to protect the very consumers that the first round of credit card regulations purportedly helped.[28] Not only did the elimination of anti-steering rules create a surcharge regime prone to abuse, but it also required the Australian government to re-legislate an issue it had already attempted to solve. This sequence illustrates the perils of meddling in an already-functional free market: unintended consequences may harm certain parties and require continued governmental interference and expenditure of resources.

Finally, in addition to merchants withholding cost savings from customers and passing on only high surcharges instead, the RBA's regulations have also significantly diminished cardholder rewards. The RBA itself admitted in 2012 that customers were paying more and receiving less, noting that "benefits earned from spending on credit cards have become less generous while annual fees to cardholders have increased."[29] The RBA reiterated this conclusion as recently as 2016, when it conceded that "the cap on the highest credit card rates, is likely to result in some reduction in the generosity of rewards programs on

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[28] Reserve Bank of Australia, *Reforms to Payment Card Surcharging* (Mar. 2013), *available at* https://goo.gl/FjHDvK; *see also* CHOICE, *Credit Card Surcharges Need Government Action* (May 29, 2013), *available at* https://goo.gl/mpL79y (stating that "it's obvious the new surcharging rules are not working as intended" and "welcom[ing] the Federal Government's intervention").

[29] Iris Chan, Sophie Chong & Stephen Mitchell, *The Personal Credit Card Market in Australia: Pricing Over the Past Decade*, Reserve Bank of Australia, at 55 (Mar. 2012), *available at* https://goo.gl/zocAQ1.

some premium cards."[30] The RBA's interference in the credit card industry continues to cause the reduction of rewards opportunities for customers, eliminating both choices and benefits for cardholders.[31] In fact, one of the articles cited in the ARA's brief to support its assertion that Amex continues to offer "lucrative rewards credit cards"[32] actually begins with the clause, "While a number of *popular rewards cards have had their value slashed in recent months* . . . ."[33]

These credit cards rewards are unquestionably valuable to consumers.[34] Beyond that, reward programs also spur competition in the credit card industry as card providers compete to provide the best reward

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[30] Reserve Bank of Australia, *Review of Card Payments Regulation: Conclusions Paper*, at 47 (May 2016), *available at* https://goo.gl/FvDGtE.

[31] *See, e.g.*, Emily Cadman & Matthew Burgess, *Australians Wave Goodbye to Lavish Credit Card Perks*, Bloomberg (Mar. 13, 2017), *available at* https://goo.gl/vxHKU3; Jan McCallum, *Change Is Coming to Credit Card Rewards Programs*, INTHEBLACK (May 15, 2017), *available at* https://goo.gl/taAXX8; Chris Chamberlin, *Aussie Banks Rethink Credit Card Points, Fees Ahead of RBA Reform*, Australian Business Traveler (Jan. 12, 2017), *available at* https://goo.gl/9cdMsT.

[32] ARA Brief, at *22.

[33] Rebeccah Elley, *The 7 Best Rewards Credit Cards of 2016 in Australia*, Mozo (Jan. 2017) (emphasis added), *available at* https://goo.gl/yu6Fe6 (cited in ARA Brief, at *22 n.59).

[34] *See* Transcript, *United States v. American Express Co.*, No. 10-CV-4496 ("Amex Tr."), at 3962:14-16 (July 29, 2014) ("People want to use their American Express cards because they get rewards and American Express operates a very attractive rewards program."); *id.* at 4296:25-4297:1 (July 30, 2014) ("Rewards also create demand, not just at a particular merchant but for all merchants it creates that demand.").

packages to attract more consumers.[35] The reduction of rewards resulting from the elimination of anti-steering rules therefore not only harms consumers, but also creates an anticompetitive spiral that makes rectifying that harm nearly impossible.

B. The RBA's Regulations Are Harmful to Competition and Incompatible with Free-Market Principles

Beyond the questionable benefits conferred by the elimination of anti-steering rules and the clear harm it has inflicted on Australian consumers, this regulation was, at its core, an effort by the RBA to encourage the use of certain payment methods and favor merchants over other constituents in the market. Such a heavy-handed approach from the government runs counter to the United States' historic adherence to free-market principles.

Essentially, the RBA regulations aimed to remove rewards from the credit card system (a successful effort, as per the above), turn credit cards into a commodity, and drive consumers toward other forms of payment. As the ARA noted, the RBA's "intended result" was to "mov[e] consumers to lower-cost payment methods."[36] Statements by the RBA confirm that

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[35] *See* App. 179a ("Visa and MasterCard introduced new premium card categories intended to enable issuers to more effectively compete with Amex's high reward products."); Amex Tr. at 4260:7-12 (July 30, 2014) (noting that "different issuers of cards" are "certainly competing by offering what they hope cardholders will consider to be attractive rewards").

[36] ARA Brief, at *7.

it "introduced reforms" in an effort to "encourag[e]" the use of payment methods other than credit cards.[37]

Enacting reforms with such a targeted result in mind is harmful to competition on its face. A market-driven approach would allow credit card companies to offer terms—including anti-steering provisions—to merchants, who can then accept them, reject them, or negotiate based on business considerations. As Australian economists have maintained, "[t]he decision to accept credit card payments is a commercial decision that merchants make – there is no justification for the RBA to second-guess those commercial decisions."[38] Clearly, in the United States, merchants are exercising their right to make this commercial decision, as "roughly one-third of credit card-accepting merchants in the United States currently do not accept Amex," reflecting that merchants "reach different conclusions about whether or not to accept [Amex]" based on their "different costs and benefits."[39]

Protecting merchants' freedom to make this choice is far more compatible with the historic economic philosophy of the United States than is imposing regulations that bar anti-steering rules in commercial contracts. "The antitrust laws reflect a basic national

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[37] Michele Bullock, *A Guide to the Card Payments System Reforms*, Reserve Bank of Australia Bulletin, at 51 (Sept. 2010), *available at* https://goo.gl/qHfG5R.

[38] Sinclair Davidson & Jason Potts, *A Submission to the Reserve Bank of Australia's Consultation to the Bank's Standards for Credit Card Payments*, at 5 (Feb. 2016), *available at* https://goo.gl/XTZVL3.

[39] App. 47a.

policy favoring free markets over regulated markets."[40] Consistent with this national policy, this Court should not endorse an attempt to transform the antitrust laws into a mechanism to frustrate the free market rather than support it. This is especially true in this context, where regulations would "create as many distortions as they remove," making it difficult for "antitrust or competition policy [to] fashion a useful remedy."[41] Accordingly, Amex's right to include anti-steering provisions in its merchant contracts should be preserved.

II. THE ARA ERRONEOUSLY CLAIMS THAT THE ELIMINATION OF ANTI-STEERING RULES ALONE DIRECTLY CAUSED CERTAIN ECONOMIC EFFECTS AND TECHNOLOGICAL ADVANCEMENTS

The ARA begins its argument with the blithe assertion that the elimination of anti-steering rules in Australia has fostered price competition and created a dramatic drop in the merchant fees charged by Amex. This explanation elides the fact that the RBA's credit card regulation was a comprehensive effort focused not only on anti-steering provisions, but also on capping interchange fees and liberalizing access to Australia's credit card schemes. Ascribing the purported benefits of these reforms to the elimination of anti-steering provisions alone—as the ARA has done—is incorrect and misleading. Further, many of the innovations in the Australian credit card space identified by the ARA are more properly attributed to broader technological

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[40] *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 388 (1991).

[41] Epstein, *The Regulation of Interchange Fees*, at 556.

progress, rather than the narrow cause of the removal of anti-steering rules.

A. Eliminating Anti-Steering Rules Was Only One Part of Australia's Comprehensive Regulation of the Credit Card Industry

As noted by the ARA, in October 2000, the RBA and the Australian Competition and Consumer Commission ("ACCC") published a report entitled "Debit and Credit Card Schemes in Australia: A Study of Interchange Fees and Access."[42] This study was "a comprehensive one"[43] that focused on "a number of public interest issues relating to competition and efficiency in credit card schemes."[44] Indeed, the RBA and ACCC acknowledged that "debit and credit card schemes have been the subject of a number of official and other studies in Australia," but differentiated their study based on the fact that "[i]nterchange fee arrangements"—not steering rules—would be "the main focus" of their enterprise.[45]

Following this study, in 2002, the RBA enacted what the ARA described as "a set of comprehensive reforms" to the credit card regulatory framework.[46] The RBA

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[42] Reserve Bank of Australia & Australian Competition and Consumer Commission, *Debit and Credit Card Schemes in Australia: A Study of Interchange Fees and Access* (Oct. 2000), *available at* https://goo.gl/tmrmE5 (hereinafter, "2000 RBA Study").

[43] Reserve Bank of Australia, *Payments System Board Annual Report 2000*, at 11, *available at* https://goo.gl/GDSoiR (hereinafter, "2000 RBA Report").

[44] Reserve Bank of Australia, *Payments System Board Annual Report 2001*, at 14, *available at* https://goo.gl/JS4sRg.

[45] 2000 RBA Study, at 2.

[46] ARA Brief, at *4.

explained its sweeping changes as "a package of reforms . . . [to] the Australian payments system,"[47] and the RBA has used the phrase "package of reforms" to describe the 2002 changes in the years that followed.[48] The RBA listed three main sets of regulatory measures: (1) "a standard on interchange fees" that included a "benchmark" rate; (2) "a standard on merchant pricing" that removed no-surcharge rules; and (3) "an access regime that removes restrictions on the eligibility of non-financial institutions to apply to participate in the designated credit card schemes."[49] Only one of these regulatory actions—the removal of no-surcharge rules—relates to the anti-steering provisions at issue here.

In fact, evidence suggests that the regulation of interchange fees,[50] rather than the elimination of anti-steering rules, was the most significant among the suite of reform measures.[51] Given the RBA's focus on

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[47] Reserve Bank of Australia, *Reform of Credit Card Schemes in Australia IV: Final Reforms and Regulation Impact Statement*, at 33 (Aug. 2002), *available at* https://goo.gl/dKkNYC (hereinafter, "RBA Final Reforms").

[48] *See, e.g.*, Malcolm Edley, *Speech to the Cards & Payments Australia Conference* (May 12, 2016), *available at* https://goo.gl/RkQGJm ("[A]fter a period of consultation, a package of reforms was implemented from 2003 onwards."); RBA Issues Paper, at 4, 5.

[49] RBA Final Reforms, at 33.

[50] The interchange fee reforms set a hard cap, requiring that the weighted average interchange fees in the MasterCard and Visa credit card schemes not exceed 0.50% of value of the transactions. *See* Reserve Bank of Australia, *Reform of Australia's Payments System: Conclusions of the 2007/08 Review*, at 3 (Sept. 2008), *available at* https://goo.gl/CiS9BD.

[51] *See* Epstein, *The Regulation of Interchange Fees*, at 582 (recognizing that capping interchange fees was the most important of the RBA's credit card industry reforms).

interchange fees in enacting its regulations,[52] it is no surprise that anti-steering rules were a secondary concern. Thus, anti-steering regulations were only one element—and likely a small element—of the RBA's comprehensive regulation of the credit card industry.

B. Ascribing Positive Economic Effects and Technological Innovation to the Elimination of Anti-Steering Rules is Facile and Misleading

Because elimination of anti-steering rules was only one part of the larger set of credit card regulations imposed by the RBA, it is misleading for the ARA to attribute all the purportedly positive effects of the regulations to the removal of anti-steering rules alone. The ARA claims that the reductions in merchant fees "are a direct result of merchants' ability to differentially price credit card services so as to foster price competition."[53] In fact, it was the RBA's direct regulation of Visa's and MasterCard's interchange rates—coupled with the threat of direct regulation of Amex's rates—that led Amex to reduce its rates as well. The data makes clear that the reduction in merchant fees from Visa and MasterCard is directly attributable to the interchange rate regulation.[54] The RBA has

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[52] *See, e.g.*, 2000 RBA Report, at 2 (describing the 2000 RBA Study as "a major study of interchange fees"). In addition, the 2000 RBA Report mentions "no surcharge" rules only twice in the 51-page report, whereas interchange fees are discussed in detail throughout.

[53] ARA Brief, at *6.

[54] Reserve Bank of Australia, *Payments Data C3: Average Merchant Fees for Debit, Credit and Charge Cards, available at* https://goo.gl/VzNZKD.

acknowledged that Amex rates declined in response as well, stating, "Merchant service fees charged by both American Express and Diners Club have been under downward pressure as merchants have reviewed their acceptance of these cards given the increase in their relative costs compared to MasterCard and Visa cards."[55] As explained at trial, the RBA's interchange fee regulation "put pressure" on Amex, leading the company to conclude that its "rate did have to come down" in response.[56] Therefore, ARA's insistence that elimination of anti-steering fees alone resulted in the widespread reduction of merchant fees is belied by the data, the statements of the RBA, and testimony at trial.

Similarly, the ARA's use of Woolworths as a "case study" to suggest that lower merchant fees resulted from the elimination of anti-steering provisions is misleading.[57] First, as described above, the downward pressure on merchant discount fees came primarily from the RBA's cap on interchange fees, rather than its removal of anti-steering rules. Direct rate regulation was far more responsible for the drop in merchant fees than the elimination of anti-steering provisions.[58] Second, the reduction of merchant fees for Woolworths can be attributed to a number of other factors, most significantly its rapidly growing charge

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[55] RBA Preliminary Conclusions, at 20; *see also* Amex Tr. at 4652:25-4653:1 (July 31, 2014) (explaining that "regulators forc[ed] a price reduction and forc[ed] the payment networks to reduce their rates").

[56] Amex Tr. at 5823:20-25 (Aug. 7, 2014).

[57] *See* ARA Brief, at *12-13.

[58] *See supra* notes 54-56 and accompanying text.

volume, which resulted from a series of acquisitions and expansions.[59] This dramatic increase in charge volume put Woolworths in a stronger position to negotiate lower merchant fees with all major credit card companies, irrespective of the RBA's regulations.

The ARA's myopic view of the Woolworths "case study" is emblematic of its failure to credit broader market forces for certain developments it claims to have witnessed in Australia. For example, the ARA states that "innovation" in the credit card space has "flourished in Australia" since the "removal of the anti-steering rules."[60] Example "innovations" include the introduction of chip cards, contactless payment systems, and online systems for payment.[61] However, these technologies are already present or emergent in the United States—where anti-steering provisions are still permitted.[62] Indeed, the removal of anti-steering

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[59] *See, e.g.*, Allan Fels, *The Regulation of Retailing—Lessons for Developing Countries*, 15 Asian Pacific Business Review, no. 1, at 13-27 (Jan. 2009); Evan Jones, *Liquor Retailing and the Woolworths/Coles Juggernaut*, Journal of Australian Political Economy, no. 55, at 23-47 (June 2005).

[60] ARA Brief, at *15.

[61] *Id.* at *15, *17.

[62] *See, e.g.*, Sienna Kossman, *Poll: 70 Percent of Consumers Now Have EMV Chip Cards*, CreditCards.com (Apr. 6, 2016), *available at* https://goo.gl/imjSoR; *For the First Time, Visa Chip Transactions in the U.S. Surpass One Billion*, Visa (Mar. 2017), *available at* https://goo.gl/4xYMBK; Juan Rodriguez & Jeff Herman, *Contactless Cards Set to Hit US*, CreditCards.com (Aug. 30, 2017), *available at* https://goo.gl/zXKRHf; *Level of Familiarity with PayPal According to Online Users in the United States as of December 2016*, Statista, *available at* https://goo.gl/4VNua9 (noting that 99% of U.S. online users were aware of PayPal and 76% had used it).

rules in Australia occurred fifteen years ago, and the progress described by the ARA is more the result of technological advancements over that time than an innovation boom *caused* by one element of the Australian regulatory framework.

In sum, the elimination of anti-steering provisions was only a single piece of a larger regulatory system imposed by the RBA, and the direct impacts ascribed to it by the ARA are dubious at best.

III. THE CREDIT CARD INDUSTRIES IN AUSTRALIA AND THE UNITED STATES ARE FUNDAMENTALLY DIFFERENT

Comparisons between the Australian and the United States credit card industries are flawed because they are different in key respects. The ARA claims that it "do[es] not profess to know the intricacies of the U.S. market," but nevertheless asserts—without evidence or corroboration—that "the Australian banking system is very similar to its counterpart in the United States" based on factors like "the mix of credit to debit cards."[63] Drawing that conclusion regarding the similarity of the two economic systems ignores the important differences between Australia and the United States that undermine any comparison of the two nations' credit card industries. As the GAO has made clear, "differences regarding the regulatory and market structures between [Australia, among others] and the United States make it difficult to estimate the effects of any similar actions in the United States."[64]

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[63] ARA Brief, at *23.

[64] GAO Report, at 30.

Critically, the market for issuing credit cards in Australia is structurally different from that in the United States. While thousands of banks issue credit cards in the United States, only four banks in Australia issue a substantial majority of credit cards. As the GAO found, "the four largest banks in Australia issued 55 percent of cards" in 2006, whereas "the United States has more than 6,000 depository institutions that issue credit cards."[65] "[T]herefore," the GAO continued, "the costs of issuing credit cards in [the United States] could be different than in countries with many fewer issuing banks," like Australia.[66] And, as noted at trial, the structure of the Australian market presents a "unique situation"[67] and a "regulatory context" that is "very complicated" and "very different" from that in the United States.[68]

The unique structure of the Australian market allowed credit card companies to partner with the issuing banks in response to the RBA's regulations, an option that would likely not be available in the United States. For example, because there are only four major issuing banks in Australia, Amex was able to work with those institutions and grow its Global Network Services ("GNS") business, through which Amex partners with banks to issue cards on the Amex network.[69] This sort of partnership would not be

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[65] *Id.* at 38; *see* Amex Tr. at 4653:10 (July 31, 2014) (estimating that there are 10,000 institutions that issue credit cards in the United States).

[66] GAO Report, at 38.

[67] Amex Tr. at 4652:25 (July 31, 2014).

[68] *Id.* at 6612:16-17 (Aug. 14, 2014).

[69] Chan, et al., *Pricing over the Past Decade*, at 61.

feasible in the United States, where Amex would be required to forge these relationships—at significant cost—with thousands of institutions, each controlling only a fraction of the credit card industry.

Put simply, "Australia has so many differences from the U.S.," and those "differences are dramatic."[70] The ARA's attempt to analogize those two economic systems is, at best, lacking.

* * *

In sum, the elimination of anti-steering rules in Australia is not relevant for the United States, and to the extent that it is relevant, the outcomes counsel *against* enacting such regulation. The evidence suggests that elimination of anti-steering rules has harmed customers—and competition—more than it has helped. Moreover, anti-steering rules were eliminated in conjunction with other, more significant credit card regulations that are far more likely drivers of any purported positive impacts seen in the Australian economy. These regulations were also implemented in a larger framework that is fundamentally different from the system in place in the United States.

Essentially, the ARA asks this Court to endorse the elimination of anti-steering rules based on the Australian experiment. But that experiment had poor controls, used a non-representative sample, and has yielded disastrous results. Inflicting these regulations on the credit card industry in the United States would be a treatment far worse than the disease.

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[70] Amex Tr. at 6594:11-14 (Aug. 14, 2014).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

KENNETH E. LEE
Counsel of Record
TEENA-ANN V. SANKOORIKAL
DYLAN A. STERN
LEVINE LEE LLP
650 Fifth Avenue, 13th Floor
New York, NY 10019
(212) 223-4400
klee@levinelee.com

Counsel for Amicus Curiae

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IN THE
Supreme Court of the United States

OHIO, *et al.*,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CLEARING HOUSE ASSOCIATION L.L.C. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Robert C. Hunter
Paige E. Pidano
THE CLEARING HOUSE ASSOCIATION L.L.C.
1001 Pennsylvania Ave., N.W.
Suite 720 North Tower
Washington, DC 20004
(202) 649-4600

Richard S. Taffet
Counsel of Record
David B. Salmons
Judd E. Stone
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, NY 10178
(212) 309-6000
richard.taffet@morganlewis.com

Counsel for Amicus Curiae

DATE: January 23, 2018

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INTERESTS OF *AMICUS CURIAE*[1]

The Clearing House, established in 1853, is the oldest banking association and payments company in the United States.

The Clearing House Association L.L.C. is a nonpartisan advocacy organization that represents the interests of its owner banks by developing and promoting policies to support a safe, sound, and competitive banking system that serves customers, communities, and economic growth. The Clearing House Association frequently participates as an *amicus* in cases that are important to the banking industry and financial sector.

Its affiliate, The Clearing House Payments Company L.L.C., which is regulated as a systemically important financial market utility, owns and operates payments technology infrastructure that provides safe, sound, and efficient payment, clearing, and settlement services to financial institutions. It also promotes innovation and thought leadership for the development of future generations of payments systems, products, and services. It presently clears and settles transactions worth approximately $1.7

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[1] The parties in this case have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that this brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

trillion every day, providing these services over its three traditional "industrial-strength" payment systems: (1) The Clearing House Interbank Payments System, a funds-transfer (wire) system; (2) the Electronic Payments Network, an automated clearing house network; and (3) the TCH Image Exchange Network, a check-image clearing house. It has also built and just launched a fourth payment system, the RTP® system—the first new payments system in 40 years—over which interbank transactions can be cleared and settled within seconds, with content-rich messaging, allowing all depository institutions and non-banks to develop new innovative payments products and services.

The Clearing House has a strong interest in this case. Each of the payment systems operated by The Clearing House Payments Company is a two-sided platform that must balance the competitive interests of participants on both sides (*i.e.*, payors and payees, and their respective financial institutions). The Clearing House respectfully submits this *amicus* brief to highlight the most important feature of the Second Circuit's correct analysis: it properly considered *both* sides of the particular two-sided market analyzed in this case. This economically appropriate approach has far-reaching consequences in numerous other two-sided payment platforms. A proper antitrust analysis of a two-sided market requires considering the competitive effects of both sides of that market, taken on balance. Otherwise, as this case potentially illustrates, one side of the platform (merchants) may lever potentially enormous antitrust liability against

the two-sided platform to extract benefits from the other side (cardholders). Such rent-seeking transfers threaten great harm both to two-sided markets themselves and to consumers. A correct antitrust analysis must therefore require a showing of net competitive harm, taking into account *both* sides of a two-sided market, lest consumers pay the costs of misdirected antitrust enforcement. For this reason, in particular, the decision of the court of appeals in this case should be affirmed.

SUMMARY OF ARGUMENT

This case asks the Court to reaffirm a fundamental and uncontroversial principle of antitrust law—that courts applying the rule of reason to complex and evolving markets must develop a practical understanding of the way firms compete in those markets. The Second Circuit's judgment should be affirmed because it accurately reflects the functioning of—and financial institutions' competition in—the payment systems, including those that The Clearing House has facilitated for over a century.

Specifically, this case requires the Court to apply the Sherman Act to the two-sided platforms that underlie the credit card and broader payment industries. As the lower courts recognized, the credit-card industry is of vital importance to the U.S. economy. Credit cards have become "a principal means by which consumers in the United States purchase goods and services from the nation's

millions of merchants." Pet. App. 73a-74a. Because of the size and convenience of these unique two-sided platforms, which provide simultaneous, interrelated benefits to participants on both sides—merchants and consumers—"the credit-card industry has generated untold efficiencies to travel, retail sales, and the purchase of goods and services by millions of United States consumers." *Id.* at 5a. The benefits to consumers of these two-sided payment platforms are undeniable and, accordingly, the number of transactions on these platforms has continued to grow. And, these benefits are of an even far greater magnitude when consideration is given to the overall payment ecosystem, which includes the multi-sided payment platforms operated by The Clearing House (and the Federal Reserve).

The unique characteristics of two-sided platforms—and their implications for antitrust policy—have attracted the attention of economists and scholars. Nevertheless, the concept of two-sided markets in economics is relatively new, and this case is one of the first to explicitly address them.

Given the importance of two-sided platforms, and their continuing evolution, this Court's deliberations should be grounded in competitive realities. It is precisely in these circumstances where this Court's antitrust precedents mandate that the judicial analysis under the rule of reason must consider all facts and circumstances and reflect the commercial realities facing consumers.

That is particularly true in regard to defining the relevant product market. A narrow view of the rule of reason and a one-sided definition of the relevant market in the context of two-sided platforms would ignore the inextricably interrelated effects from both sides of two-sided platforms that are necessary for such platforms to competitively succeed. Such a narrow focus would undermine the incentives of participants on both sides of the platform to support the overall network, ultimately harming consumers.

An "emerging consensus" is developing internationally that competition law should recognize the unique benefits that two-sided platforms provide to both consumers and merchants and make sure that antitrust analysis accounts for the competitive realities of both sides of two-sided platforms. As addressed by the Organisation for Economic Co-Operation and Development ("OECD"), this "emerging consensus" among the 35 nations that make up its membership, is that antitrust policy generally, and the standards for defining relevant product markets in particular, must take into account "the linkages between the two sides" of multi-sided platforms, and "the complexity of the interrelationships among customer groups."[2] OECD,

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[2] The OECD consists of 35 member countries representing most of the world's developed countries. Founded in 1961, it provides a forum for these countries' governments to discuss policies, share experiences, and solve complex problems internationally, including those arising from antitrust and competition law problems.

Two-Sided Markets 11 (Dec. 17, 2009), https://www.oecd.org/daf/competition/44445730.pdf. Or as the OECD put it more bluntly: "Mechanical market definition exercises that exclude one side usually lead to errors." *Ibid.*

This economically sound advice aligns with this Court's long-standing unwillingness to condemn unfamiliar practices, much less those with tangible consumer benefits. This Court has taken into account the federal courts' familiarity with a given economic arrangement—in this case, virtually none—when determining an appropriate antitrust liability regime for that type of arrangement. Likewise, this Court has recognized the importance of balancing the costs from both under- and over-inclusive theories of antitrust liability, along with the risks of sacrificing immediate consumer benefits to protect against speculative harms. Each of these economically sound principles counsels toward requiring a showing of competitive harm by antitrust plaintiffs claiming that two-sided arrangements are anticompetitive. At minimum, this showing should consider the competitive effects of the arrangement as a whole, including the real, tangible benefits to consumers from these two-sided platforms. If nothing else, economically sound antitrust analysis requires courts not to ignore easily demonstrable consumer benefits from a given practice. Just so here.

ARGUMENT

I. DEFINING THE RELEVANT PRODUCT MARKET IN THIS CONTEXT REQUIRES RECOGNIZING THE TWO-SIDED NATURE OF PAYMENT NETWORKS.

A. The Rule of Reason Requires the Factfinder to Weigh *All* of the Circumstances of a Case.

Both courts below examined the practices at issue in this case under the rule of reason, which "is the accepted standard for testing whether a practice restrains trade in violation of § 1" of the Sherman Act. *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 885 (2007). The "design and function" of the rule of reason is to "distinguish[ ] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Id.* at 886.

This Court has long recognized that the line between restraints that harm competition and consumers and those that benefit them is often difficult to discern. See Part II, below. Courts must therefore take great care in applying the rule of reason, lest these restraints become the source of market distortion and consumer harm. See *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 327-28 (1961) (emphasizing that courts should conduct antitrust analysis so as to do "as little injury as possible to the interest of the general public").

That is particularly true where, as here, courts are asked to apply antitrust principles in complex markets to practices that have received little judicial or scholarly scrutiny. This Court's precedents make clear that when courts are asked to break new ground under the Sherman Act, they should favor judicial standards that permit the broadest consideration of facts and circumstances. See *Leegin*, 551 U.S. at 886 (noting that a *per se* rule "is appropriate only after courts have had considerable experience with the type of restraint at issue").

For these reasons, this Court has mandated that courts applying the rule of reason must "*weigh[ ] all of the circumstances of a case* in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Cont'l T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977) (emphasis added). Consistent with this careful, expansive analysis, a plaintiff seeking to prove a violation of the rule of reason must show that the restraint is "*prima facie* anticomptetive." *Cal. Dental Ass'n* v. *FTC*, 526 U.S. 756, 771 (1999). As the court of appeals below explained, among other things, that requires the plaintiffs to show that "defendant's challenged behavior 'had an *actual* adverse effect on competition as a whole in the relevant market.'" Pet. App. 27a (citation omitted). See *Atl. Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 335-38 (1990) (discussing requirement of showing "antitrust injury").

B. The Relevant Product Market Must Be Defined Based on the Commercial Realities Faced by Consumers.

Each step of the rule of reason analysis requires consideration of all relevant facts and circumstances, and that includes the inquiry into the relevant product market. Indeed, this Court has emphasized that "*[t]he proper market definition * * * can be determined only after a factual inquiry into the 'commercial realities' faced by consumers.*" *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 482 (1992) (emphasis added) (quoting *United States* v. *Grinnell Corp.*, 384 U.S. 563, 572 (1966)).

Frequently, the focus of the market-definition inquiry is on identifying products that are reasonable substitutes for each other. See, e.g., *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956); *Kodak*, 504 U.S. at 482; *United States* v. *Cont'l Can Co.*, 378 U.S. 441, 449 (1964). But consistent with the "all circumstances" analysis of the rule of reason as a whole, the inquiry into the relevant market is not so limited or rigid. Rather, it should include consideration of all facts relevant to the commercial realities faced by consumers. Thus, in *Grinnell*, the Court saw "no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities," whether or not the products were interchangeable. 384 U.S. at 567-68, 572.

So too here. The relevant product market in the context of two-sided networks must be defined by reference to the "commercial realties." And, central to those realities is the unique, two-sided nature of credit card and other payment networks.

C. Both Interrelated Sides of Credit Card (and Other Payment) Networks Must Be Taken into Account.

Credit card and other payment networks, like those operated by The Clearing House, are all paradigmatic examples of what economists refer to as "two-sided platforms." Payment networks bring together "two separate yet interrelated groups of customers who * * * rely on the platform to intermediate some type of interaction between them," Pet. App. 77a, allowing those on one side to pay for goods, and allowing those on the other side to sell goods and services with significantly mitigated default risk. The unique characteristics of payment two-sided markets, thus include:

- that there are two distinct groups of consumers who need each other in some way and who rely on the platform to intermediate transactions between them; the two-sided platform provides goods or services simultaneously to these two groups;

- that there are externalities across the groups of consumers, such that the value that customers on one side realize from the platform increases

with the number of customers on the other side—*e.g.*, the value to credit cardholders increases as more merchants join the network and the value to merchants increases as more cardholders join the network; and

- that the platform must design the price structure so as to induce both sides to join the platform and can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side.

See Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 Rand J. Econ. 645, 664-65 (2006) ("[A] market is two-sided if the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount; in other words, the price structure matters, and platforms must design it so as to bring both sides on board."); OECD, *Two-Sided Markets* 11 (describing elements of two-sided networks); David S. Evans & Richard Schmalensee, *Matchmakers: The New Economics of Multisided Platforms* 1-4, 8-9, 14-19 (Harv. Bus. Rev. Press 2016) (discussing essential characteristics of multisided platforms).

And as with two-sided markets more generally, the OECD's 2009 report provides important guidance for antitrust analysis of payment networks. There, the OECD explained—consistent with this Court's approach in defining relevant markets—that the need

to ensure that antitrust policies reflect the economic and commercial realities of such markets in order to avoid unintentionally harming pro-competitive and pro-consumer practices. See OECD, *Two-Sided Markets* 11, 23-25.

In particular, the OECD addressed the question of defining antitrust-relevant markets for two-sided products: "Given that two-sided markets involve two different sets of customers, a question arises as to how to treat the two sides when defining the relevant product market. Or to put it differently, there is the question of whether the two-sided market should be analyzed jointly or separately." *Id.* at 11. In answering that question, the OECD explained:

> There seems to be an emerging consensus that a precise relevant product market definition is less important than making sure the linkages between the two sides, and the complexity of the interrelationships among customer groups, are taken into account. *Mechanical market definition exercises that exclude one side usually lead to errors.*

Ibid. (emphasis added).

Indeed, the OECD's analysis tracks closely with that of the court of appeals in this case. "Typically," the OECD explained, "the analysis of market definition focuses on the effect of a price change on demand in a narrowly defined market." *Id.* at 24. But because "two-sided platforms have to coordinate

demand among two interdependent customer groups, a price change on one side of the market has positive feedback effects on the other sides of the market." *Ibid.* "Thus, the analysis must consider these feedback effects to determine the overall effect of a price change on profits." *Ibid.*; see also *id.* at 12 ("The price level, i.e., the sum of all prices, rather than individual prices or the price structure, is the appropriate means of measuring the competitiveness of a [two-sided] market and should be the focus of policy analysis."). Ignoring one side of a two-sided market may ultimately result in consumer harm by throwing off the delicate balance naturally achieved by platforms considering both sides.

The Second Circuit's analysis comported with the OECD's economically sound recommendations. That court cautioned that "[s]eparating the two markets here"—the two sides of a payment platform's market—"ignores the two markets' interdependence." *United States* v. *Am. Express Co.*, 838 F.3d 179, 198 (2d Cir. 2016). That separation would "allow[] legitimate competitive activities in the market for general purpose [card]s to be penalized no matter how output-expanding such activities may be." *Ibid.* It properly recognized the relationship between both sides of this two-sided market, noting that "the price charged to merchants necessarily affects cardholder demand." *Id.* at 200. Having properly articulated these cautions, the court properly cited the relationship between merchant charges, cardholder benefits, and increased quality and output in this particular two-sided market—and how these

increases are consistent with robust competition, rather than an anticompetitive practice. *Id.* at 205-06.

A similar analysis should apply to two-sided payment platforms outside of the credit-card context. While fundamentally different in rights and responsibilities of the parties and payment attributes, each of the payment systems operated by The Clearing House—i.e., for wire, check, ACH and real time transactions—are two-sided markets in which the competitive relationships between participants on both sides of the platforms are inextricably related, and the success of the platforms are dependent on properly aligning the incentives of all such participants. Otherwise, the volume of transactions over a specific platform could be insufficient to support the platform, and without both sets of participants, no transactions could be completed. As discussed next, these characteristics and incentives are driven by the economics of two-sided platforms.

II. THIS COURT SHOULD EXERCISE JUSTIFIED CAUTION IN IMPOSING ANTITRUST LIABILITY ON TWO-SIDED PRODUCTS.

Accounting for commercial and competitive realities is also consistent with this Court's approach in recent decades to focus on both the potential benefits and costs to consumer welfare arising from antitrust liability. This cost/benefit analysis is borne out in the Court's tailoring of antitrust analysis to specific arrangements that reflect both the federal

courts' familiarity with a given economic arrangement, *Broad. Music, Inc.* v. *Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9-10 (1979), as well as the likelihood that the arrangement, on balance, harms competition. *Leegin*, 551 U.S. at 894-98. These concerns necessarily counsel great caution in applying antitrust law in the context of two-sided markets with which the federal courts are only now developing experience, especially in connection with financial and payment platforms, which benefit consumers greatly. See Geoffrey Manne, Joshua Wright & Todd Zywicki, *Politically-Mandated Credit Card Interchange Fees Won't Create Jobs (But They Will Hurt Consumers and the Economy)*, TRUTH ON THE MARKET (Mar. 20, 2010).[3]

This Court should hew to these time-tested principles in its guidance to lower courts in this case, and rigorously consider the error and transaction costs attendant to antitrust enforcement in generally benign contexts, as consumers—not merely litigants—ultimately bear these costs. See Frank Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 21 (1984). Such an approach would be entirely consistent with the way this Court has proceeded over time in assessing the proper application of the antitrust laws and the need to account for competitive realities and the familiarity of the federal courts with such matters, most particularly how likely a given

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[3] Available at https://truthonthemarket.com/2010/03/20/politically-mandated-credit-card-interchange-fees-won%e2%80%99t-create-jobs-but-they-will-hurt-consumers-and-the-economy.

arrangement is to harm consumers after the benefits of antitrust liability *and* the costs, including error and litigation costs, are taken into account. See *State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997).

Thus, at one end, this Court treats outright price-fixing and similarly obvious anticompetitive arrangements as *per se* illegal—illegal without requiring any empirical proof of competitive harm from the specific practice challenged. *Leegin*, 551 U.S. at 886. The federal courts have ample experience with the consequences of price-fixing, and both economic and empirical evidence confirms that price-fixing cartels lead to higher prices, slower innovation, and significant consumer harm both immediately and in the long run. See, e.g., *Arizona* v. *Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 348 (1982); *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963); Easterbrook, *supra*, at 3 & n.2.

At the other, this Court requires an antitrust plaintiff to make a specific threshold showing of a strong likelihood of consumer harm for arrangements that are theoretically capable of hurting consumers on balance, but practically unlikely to do so. *Cal. Dental Ass'n*, 526 U.S. at 771-78. "Predatory pricing" claims are a good example. See generally Phillip Areeda & Donald Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). Theoretical harm from price predation is certainly possible: it is possible that a hypothetical monopolist might lower its prices to drive rivals out of a market with high

barriers to entry, enabling that monopolist to extract monopoly rents afterward. But while this harm is theoretically possible, it proves deeply implausible in practice. Easterbrook, *supra*, at 26-28. Even when entered into in an attempt to drive rivals out of a market, most predatory pricing schemes fail in the long run, and immediate price cuts, whether as part of a predatory plan or otherwise, significantly benefit consumers in the short run. See Phillip Areeda & Donald Turner, *Scherer on Predatory Pricing: A Reply*, 89 HARV. L. REV. 891, 896-97 (1976). This Court and lower courts are therefore appropriately hesitant to sacrifice immediate consumer benefits to prevent speculative, far-off consumer harms.

This dual reliance on judicial familiarity with an arrangement as well as the typical consequences to consumers from such an arrangement reflect an appropriate consideration of the error costs of antitrust enforcement. *Broadcast Music*, 441 U.S. at 9 (judicial familiarity); *id.* at 22 & n.40 (consequences to consumers). See generally Easterbrook, *supra*. The error-cost framework, relied on in American antitrust law for decades—although apparently ignored by petitioners—rests on three common-sense (and economically sound) premises. First, there are two possible mistakes in antitrust enforcement, both carrying an attendant cost: the costs of failing to sanction a practice causing competitive harm (or a false negative), and the costs of sanctioning a pro-competitive practice that benefits consumers (or a false positive). *Id.* at 2. Second, false positives are more likely to harm consumers than false negatives,

because while both markets and courts can correct false negatives, only courts can correct false positives.[4] *Id.* at 2-3, 6-7; Joshua D. Wright, *Antitrust, Multi-Dimensional Competition, and Innovation: Do We Have An Antitrust-Relevant Theory of Competition Now?*, George Mason Law & Economics Research Paper No. 09-44, at 4 (Aug. 28, 2009).[5] Third, it is impossible to eliminate both types of errors because it is often difficult to distinguish between practices that promote competition and those that harm it. Easterbrook, *supra*, at 6.

Each of these premises underscores the importance of exercising significant caution when considering antitrust liability in two-sided markets.

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[4] This is due to both market forces as well as the nature of judicial review in the antitrust context. Easterbrook, *supra*, at 15. Market participants can, and often do, adapt to punish or weaken an anticompetitive arrangement that harms competition and consumers. *Ibid.* Likewise, courts develop familiarity with the likelihood of harm from a practice and, if given sufficient experience, often identify anticompetitive practices as such. *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 607-08 (1972). Yet antitrust enforcement against a harmless practice typically drives that practice from the market altogether. Easterbrook, *supra*, at 15-16. Market forces therefore cannot vindicate such a practice, and the comparatively limited use of that practice—partially a function of the steep penalties for violating the antitrust laws—coordinately reduces judicial exposure to it. *Id.* at 6-7. False positives therefore prove significantly more harmful to consumers than false negatives, all else being equal.

[5] Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1463732.

Id. at 7-9. Judicial experience with these arrangements is only now emerging: indeed, the term "two-sided market" was coined only in 2000, David Evans & Richard Schmalensee, ***Markets with Two-Sided Platforms***, in 1 ISSUES IN COMPETITION LAW AND POLICY 667, 668 (ABA Section of Antitrust Law 2008), and compared with most arrangements in antitrust, there is virtually no judicial analysis of the antitrust implications of economic arrangements involving these complex products. Moreover, the available scholarly analysis suggests that interventions into two-sided markets can lead to significant unexpected consequences for consumers and merchants alike. See Zhu Wang, Scarlett Schwartz & Neil Mitchell, ***The Impact of the Durbin Amendment on Merchants: A Survey Study***, 100 Fed. Res. Bank of Richmond Econ. Q. 183, 186 (2014).

The little experience that American policy has with intervening in two-sided payment markets suggests that caution is especially appropriate here. Debit cards, like credit cards, are two-sided payment markets; like credit cards, their interchange fees and corresponding rules seek to balance both sides of that market—merchants and consumers—through a product attractive to both. *Id.* at 185. In response to claims that these payment products raised prices on merchants excessively, the Durbin Amendment to the Dodd-Frank Act authorized the Federal Reserve to regulate these fees. *Id.* at 183-85. Advocates for the Durbin Amendment claimed that these price caps would ultimately benefit consumers through lower prices from merchants, *id.* at 185, even in the face of

evidence that interchange fees typically paid for benefits that consumers found highly desirable, such as free checking. See *ibid.*

The Durbin Amendment has not worked as expected. In 2011, the Federal Reserve capped debit interchange fees at roughly half of their average previous amounts. *Id.* at 184. Consumers soon lost many of the benefits that the previous interchange fee subsidized, such as free checking accounts, free debit cards, and debit cards reward programs. See, e.g., Harry C. Alford, *After 6 Years, Consequence of the Durbin Amendment Are Evident*, Forbes.com (Mar. 1, 2017 2:40 PM).[6] But the promised lower prices never materialized: as both economic analyses and consumer surveys reflect, most merchants did not lower prices and kept the benefits promised to consumers for themselves. Wang, Schwartz & Mitchell, *supra*, at 194-95, 197. Nor were the Durbin Amendment's price controls even uniformly beneficial to merchants—smaller merchants ultimately paid *more* in interchange fees, squeezing their narrow margins ever further. *Id.* at 184, 200-02, 205. The only apparent beneficiaries of this intervention were large-scale retailers, which received this legislative transfer at both consumers' and payment products' expense. *Id.* at 193-94; see also *The Durbin Amendment: A Failed Experiment*, American

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[6] Available at: https://www.forbes.com/sites/realspin/2017/03/01/after-6-years-consequences-of-the-durbin-amendment-are-evident.

Bankers Ass'n (Winter 2017).[7] This unfortunate experience is hardly one to emulate.

Indeed, as respondents highlighted during the certiorari stage, there has been no appellate analysis examining the Section 1 enforcement implications for two-sided credit card markets *anywhere* before the decision below. Br. for American Express in Opposition, at 13 (citing Br. for the United States in Opposition, at 19-20). Given this relative unfamiliarity, this Court ought err on the side of more circumspect antitrust enforcement—especially given that it can revisit that determination as judicial experience with these products grows. Easterbrook, *supra*, at 4-9.

Such an approach is also consistent with this Court's sensitivity to consumer benefits from economic arrangements when determining appropriate antitrust analyses. *Leegin*, 551 U.S. at 886. Here, that inquiry is particularly straightforward: both sides of a two-sided platform such as that at issue here significantly benefit consumers through fees from merchants that support points programs, cash rebates, and other desirable perks for consumers. See also Julian Morris, Geoffrey Manne, Ian Lee & Todd Zywicki, *Punishing Rewards: How clamping down on credit card interchange fees*

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[7] Available at: https://www.aba.com/Advocacy/Documents/Durbin%20Repeal%20Leave%20Behind%20Winter%202017.pdf (last visited, Jan. 18, 2018).

can hurt the middle class, Macdonald-Laurier Institute (Nov. 2017) (demonstrating mutual benefits of credit card markets).[8] Under this Court's longstanding precedent, an arrangement as the one here, which undisputedly benefits such consumers, immediately warrants a corresponding presumption that antitrust liability for that arrangement must be rigorously justified in the light of the net beneficial effects to consumers. Any antitrust analysis that deliberately excludes the acknowledged and demonstrable effects on consumers from a given arrangement merely heightens the costs of a false positive, and ultimately sacrifices immediate consumer benefits for speculative consumer harms.

Moreover, there is special reason to be cautious in assigning antitrust liability in the context of two-sided markets based on one side's purported economic harm. Two-sided markets by definition require the participation of both sides for the product to exist in the first place. That is what makes them two-sided. David Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 Colum. Bus. L. Rev. 667, 668 (2005). Unlike a traditional market, a two-sided market brings two economic constituencies together to create a product that both sides will use. This contrasts with normal markets, such as retail stores, which purchase their

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[8] Available at https://macdonaldlaurier.ca/files/pdf/MLI-PaymentCardRegulationPaper10-17web.pdf.

inventory from an upstream wholesaler and resell it to end consumers.

Accordingly, a two-sided platform must necessarily satisfy these two constituencies with economic interests that are frequently opposed. Evans & Noel, *supra*, at 682-84 (discussing examples). In the credit-card context, for example, merchants and consumers may have opposite short-term, individualized incentives regarding interchange fees: merchants directly or indirectly bear these fees, and thus may want to keep them as low as possible; cardholding consumers neither see nor bear them, but they consume the perks funded in part from these fees. *Id.* at 682. But merchants and cardholders alike enjoy robust, easily perceived benefits from two-sided credit markets. Morris, Manne, Lee & Zywicki, *supra*, at 7. Merchants need not bear the risks of default for purchases made on credit (which are borne by the card company vis-à-vis the merchants), and they can induce consumers who happen not to carry sufficient cash for a purchase to nonetheless buy an item immediately. See *ibid.* Conversely, along with the perks that many credit cards offer, these two-sided products offer consumers greater liquidity and enable them to smooth their consumption patterns over time—all precisely because these cards are two-sided products. *Ibid.*[9]

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[9] Similar mutual benefits arise from other two-sided payment platforms. For example, billers (payees) benefit when debtors (payors) timely pay for services, and incentives supported by

These benefits have accordingly driven significant growth in payment-card transactions—and this increased volume itself suggests a robust, competitive marketplace. *Id.* at 30.

These consumer benefits promote competition precisely because they are a cornerstone of payment-card competition in this two-sided market. Payment card networks compete for cardholders at numerous stages, both in seeking new cardholders and encouraging them to use their particular payment card.[10] Evans, *Two-Sided Market Definition*, *supra*, at 16. Each consumer purchase gives cardholders a new opportunity to pick among competing features and perks, including highly desired rewards and travel programs and cash back to the consumer. *Id.* at 9. And like all competition, this repeated competition for consumers drives down prices and encourages new, innovative products—leading to greater quantities of higher quality goods. *Id.* at 3,

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payees to incentivize prompt and accurate payments benefit payors by, for example, enhanced user experiences, diminished risks of fraud or misapplication of funds, or the incurring of late fees.

[10] Payment-card networks likewise compete in attracting merchants to their networks. This competition in part relies on the significant additional business that a payment card's customers can bring to a retailer. Merchants therefore have an incentive to free ride: count on a payment network to bring customers in, but discourage them from using a network's products at the point of sale. The continued operation of a two-sided market depends on the effective prevention of these and similar free-riding problems.

n.4, 6-9. These are hallmarks of a competitive market.

That a particular two-sided market may benefit one constituency more than the other in a particular way—even that it involves a cross-subsidy from one side (merchants) to the other (cardholders)—should be of no special economic significance, and should not be the basis for antitrust liability. Such cross-subsidies occur in many contexts and often benefit consumers and competition. See Evans & Noel, *supra*, at 684. Nor, for that matter, would any serious antitrust analysis aimed at maximizing total consumer welfare ignore the *consumer* side of any purported cross-subsidy. See, e.g., David Evans, *Two-Sided Market Definition*, ABA Section of Antitrust Law, 6 (Nov. 11, 2009).[11] Such a limited view would ignore the growing experience that courts have with these products and deliberately cast it aside. An economically sophisticated antitrust analysis is superior to a doctrinally simple one. Easterbrook, *supra*, at 39-40.

These common and tangible benefits to both sides of the two-sided market suggest that this Court should, at a minimum, require plaintiffs pressing antitrust claims against two-sided networks—particularly those with significant consumer benefits—to show that the arrangement causes competitive harm when taken *as a whole*. See Pet. App. 49a-50a. Undoubtedly, most participants in

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[11] Available at SSRN: https://ssrn.com/abstract=1396751.

two-sided markets desire a greater share of the surplus generated from these arrangements at the expense of the other constituencies. But an economic harm to competitors—or between parties to the same product—does not amount to a harm to competition. See generally Evans & Noel, *supra*. If petitioners raise a cognizable antitrust claim at all, courts should require an up-front showing of net competitive harm when considering the transaction as a whole before shifting the burden under the rule of reason and requiring an antitrust defendant to show that its conduct is justified by affording procompetitive benefits that outweigh any competitive restraints. Stated differently, the costs and burdens of defending against an antitrust claim premised on an incorrect analysis of commercial and competitive realities in the first instance, would itself impose social costs that the antitrust laws, and this Court's precedents, do not support.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

January 23, 2018

Respectfully submitted,

Robert C. Hunter
Paige E. Pidano
THE CLEARING HOUSE ASSOCIATION L.L.C.
1101 Pennsylvania Ave., N.W.
Suite 720 North Tower
Washington, DC 20004

Richard S. Taffet
Counsel of Record
David B. Salmons
Judd E. Stone
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, NY 10178

Counsel for Amicus Curiae

No. 16-1454

IN THE

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STATE OF OHIO, ET AL.,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF *AMICUS CURIAE* THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF RESPONDENTS

NEAL KUMAR KATYAL
Counsel of Record
JESSICA L. ELLSWORTH
EUGENE A. SOKOLOFF
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Amicus Curiae

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IN THE

Supreme Court of the United States

No. 16-1454

STATE OF OHIO, ET AL.,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF *AMICUS CURIAE* THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST[1]

The Computer & Communications Industry Association (CCIA) is an international nonprofit association representing a broad cross-section of computer, communications, and Internet industry firms that collectively employ nearly a million

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than the *amicus curiae*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have filed blanket consents to the filing of amicus briefs in this case.

workers and generate annual revenues in excess of $540 billion. CCIA believes that open, competitive markets and original, independent, and free speech foster innovation. It regularly promotes that message through amicus briefs in this and other courts on issues including competition law, intellectual property, privacy, and cybersecurity. *See, e.g.*, *TC Heartland LLC* v. *Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017) (patents); *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014) (copyright); *Ill. Tool Works, Inc.* v. *Indep. Ink, Inc.*, 547 U.S. 28 (2006) (antitrust).

CCIA's concern is not so much with the specific policies challenged by petitioners in this case. CCIA submits this brief to draw attention to the importance of undertaking a nuanced rule-of-reason analysis such as the one the Second Circuit performed in this case. The position advanced by petitioners and the United States here threatens innovation by embracing an analytical framework in antitrust cases that ignores the significant differences between firms with one set of customers ("one-sided firms") and firms that have multiple, interrelated sets of customers ("multi-sided firms") such as many of CCIA's members. Those members offer everything from diverse virtual marketplaces to real-world services. Because the rules that petitioners and the United States advocate fail to account for the competitive realities many of its members face, CCIA urges this Court to affirm the Second Circuit and hold that courts applying the rule of reason must consider constraints on all sides of a multi-sided firm when assessing whether a plaintiff has made out a *prima facie* case of anticompetitive conduct.

INTRODUCTION AND SUMMARY OF ARGUMENT

The assumptions that underlie antitrust analysis of single-sided firms do not automatically translate to multi-sided firms. That is because firms operating in multi-sided markets[2] must often consider the effects of their pricing and output decisions to both sets of customers, as well as the interrelationship *among* the customers on each side. These complex dynamics mean that conduct that might appear anti-competitive when only one set of customers is considered may in fact be entirely consistent with—and actually promote—healthy competition when competition on both sides is considered. Acting on this appearance, without fully understanding the competitive dynamics that impact all sides of a multi-sided firm, raises the risk of enforcers and courts condemning pro-competitive conduct that benefits consumers, potentially stifling innovation.

The dispute before the Court involves only the payment-card industry, which operates under its own particular dynamics. But the question before the Court is framed broadly enough that the Court's answer could have implications for the diverse array of multi-sided business models. This Court should take care to ensure that the rule it crafts in this case is sufficiently flexible to account for the existing diversity of multi-sided business models and their respective dynamics.

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[2] "Multi-sided market" is a term of art in economics literature. It is not related to the definition of a market under the antitrust laws.

I. Multi-sided firms create value by bringing market participants together. They help reduce practical barriers and transaction costs. But because many multi-sided firms work by facilitating interactions among diverse customer sets, the demand for the services that such a firm offers to each of its "sides" depends on the demand for the services it offers to its *other* sides. This interrelated demand has significant consequences for antitrust analysis. It may lead multi-sided firms to set prices in ways that bear little resemblance to pricing by single-sided firms. And it means that seemingly small changes in demand on any side of the market could be amplified by corresponding changes on the other sides.

II. This Court has explained that "the purpose of the inquiries into market definition and market power" in antitrust cases "is to determine whether an arrangement has the potential for genuine adverse effects on competition." *FTC* v. *Ind. Fed'n of Dentists*, 476 U.S. 447, 460 (1986). In case after case, the Court has emphasized that these inquiries require a close examination of "the economic reality of the market at issue." *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 467 (1992); *see United States* v. *Sealy, Inc.*, 388 U.S. 350, 359 (1967) (rule of reason requires a focus on "the context of the particular industry"). This Court's guidance concerning the rule of reason counsels caution when courts apply tests created in the context of single-sided markets to multi-sided firms.

Multi-sided firms are constrained by the availability of substitute products, but they may also face the additional constraint of interrelated demand from multiple sets of customers. One effect of such

interrelated demand is to limit a multi-sided firm's ability to unilaterally raise prices or reduce output. If the tests of market definition and market power fail to account for these additional constraints, they may cause multi-sided firms to *appear* to enjoy power over price and output when they are, in fact, engaged in vigorous competition.

Without considering the actual effects of multi-sidedness, courts may not be able to reliably determine whether a Sherman Act plaintiff has carried its *prima facie* burden to establish "the potential for genuine adverse effects on competition." *Ind. Fed'n of Dentists*, 476 U.S. at 460.

III. This Court has warned against ignoring "[t]he cost of false positives" when crafting antitrust rules. *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004). Ignoring the competitive realities of multi-sided firms would raise the risk of false positives and "interminable litigation," *id.*, stifling pro-competitive conduct and pro-consumer innovation. It would allow plaintiffs to base a *prima facie* case on little more than a caricature of a multi-sided firm's competitive position, penalizing healthy competition and deterring the development of valuable new products and services that benefit both competition and consumers.

ARGUMENT

I. MULTI-SIDED FIRMS FACE THE CONSTRAINT OF INTERRELATED DEMAND

Buyers and sellers often transact directly. Sometimes, though, that may be impractical or costly. A person may want to sell a rare stamp, for example, but lack the means to identify, let alone to contact, collectors halfway around the world who may be interested in buying it. Or it may simply be that buyers or sellers—or both—would be better off if they could access as many of their counterparts as possible at once. Without some intermediary, buyers and sellers in such cases may connect inefficiently or not at all.

Economists have developed the concept of "multi-sided firms" as a way to describe business models designed to solve these problems, whether they are familiar examples such as newspapers or shopping malls, or innovative new services like dating websites. *See, e.g.*, David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multisided Platform Businesses*, *in* 1 Oxford Handbook of International Antitrust Economics 404, 404-405 (Roger D. Blair & D. Daniel Sokol, eds., 2015). Multi-sided firms reduce or eliminate the practical barriers, or transaction costs, that would prevent a stamp seller in one place from connecting with a stamp collector in another. *See id.* In doing so, they create value "that would not exist (or would be much smaller) in [their] absence." *Id.* at 409.

Companies at the leading edge of technological innovation, including many of CCIA's members, have harnessed technologies to serve multiple,

interrelated sets of customers and offer valuable products and services to businesses and consumers alike. Indeed, this case highlights the wide range of business models that could be thought of as "multi-sided," from Internet search engines, to video game platforms, to shopping malls—each with its own economic dynamics.

Because many multi-sided firms generate value by facilitating transactions among their various customer sets, the demand for the services that a multi-sided firm offers to any one "side" depends not only on the characteristics of those services, but also on demand for the services offered to the *other* sides. *See, e.g.*, Lapo Filistrucchi et al., *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. Competition L. & Econ. 293, 296-297 (2014). Thus, such firms must not only cater to the individual needs of their various customers, but also manage the interrelationships between those needs.

The interrelatedness of demand among sides of a multi-sided firm can have consequences that are particularly significant for antitrust analysis. First, multi-sided firms may set prices in ways that defy the expectations of an economic analysis grounded in single-sided markets. For example, they may give valuable services away for free to build an audience that will attract advertisers or sellers. *See id.* at 300. The second, related consequence is that multi-sided firms may face highly elastic demand, which can lead to transitory market structures that significantly constrain their ability to impact output and price. A restaurant reservation website, for example, may attract what appears to be a significant share of the market for diners. But that share is dependent on the website's ability to offer diners a sufficient

number of restaurants. If restaurants switch to a different site because of a price increase, the previously significant market share might quickly dry up. *See* Evans & Schmalensee, *supra* at 408, 410-411.

These effects can upset assumptions that ordinarily hold for single-sided firms. For example, the prices charged to each side by a multi-sided firm vary in relation to the *aggregate* variable cost of providing products or services to customers on various sides of the market and not only with the marginal cost of one product (as they would in a single-sided market). *See* David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 Yale J. on Reg. 325, 343 (2003). Thus, "[a]n increase in marginal cost on one side [of the market] does not necessarily result in an increase in price on that side relative to price on the other side[s]." David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 Colum. Bus. L. Rev. 667, 681-682 (2005). And because increasing the customer base on one side of the market may make participation more valuable to participants on the other sides, price increases that stimulate participation may actually accompany an increase in consumer welfare overall. *See* Evans, *supra*, at 361.

II. ANTITRUST ANALYSIS MUST ACCOUNT FOR THE DYNAMICS OF MULTI-SIDED FIRMS

This Court's rule-of-reason cases demand careful attention to "the economic reality of the market at issue." *Kodak*, 504 U.S. at 467. Yet the most commonly used analytical tools in antitrust were

developed to analyze single-sided markets; they may fail to account for the "actual market realities" of many multi-sided firms. *Id.* at 466. These shortcomings raise the risk that courts, prompted by arguments advanced by petitioners and the United States, will ignore significant constraints on multi-sided firms and perceive anticompetitive conduct where none exists. That will encourage meritless litigation and increase the risk of false positives, deterring innovation and hindering consumer welfare.

A. Antitrust Analysis Must Reflect Competitive Realities

A crucial question in many antitrust cases is whether the defendant has market power, or whether it is effectively constrained by competitive forces. The test of "market power" aims to discern whether a firm has "the ability" to unilaterally "raise price and restrict output." *Kodak*, 504 U.S. at 464.

To answer that question, courts begin by defining the market where the relevant competition occurs. Traditionally, the scope of the "relevant market" for antitrust purposes has been "determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962).

The focus on product substitutes makes perfect sense in a one-sided market. "[W]here there are market alternatives that buyers may readily use," a firm will not have the kind of "control of price or competition" the antitrust laws are meant to prevent. *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 393 (1956). Because demand elasticity is

the key competitive driver of price in such markets, the presence of "substitute products" to which "customers may turn * * * if there is a slight increase in the price of the main product" will tend to constrain a firm's influence over prices. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966).

But identifying substitutes is useful only insofar as it helps to answer the ultimate question: whether the defendant possesses sufficient market power that it could unilaterally "raise price and restrict output." *Kodak*, 504 U.S. at 464 (internal quotation marks omitted). The purpose of defining the relevant market is not, as the United States claims, simply "to identify the products that compete with the defendant's products." U.S. Br. 36. Rather, as this Court has explained, "the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition." *Ind. Fed'n of Dentists*, 476 U.S. at 460. And that requires careful attention to "actual market realities," *Kodak*, 504 U.S. at 466, in "the context of the particular industry" at issue. *Sealy*, 388 U.S. at 359.

The judge-made tests of market definition and market power must therefore consider "market realities." In cases involving multi-sided firms, courts seeking "to determine whether an arrangement has the potential for genuine adverse effects on competition," *Ind. Fed'n of Dentists*, 476 U.S. at 460, must account for all of the competitive constraints such firms may face.

B. The Judge-Made Tests Of Market Definition And Market Power Must Account For Multi-Sidedness

Market definition "identifies the sources of demand-side and supply-side constraints that matter in assessing market power." Evans & Schmalensee, *supra*, at 420. For that reason, "market definition generally determines the result of the case." *Kodak*, 504 U.S. at 469 n.15. Multi-sided firms are constrained by the availability of substitute products. But pricing and output decisions in a multi-sided market may be also subject to constraints that arise from the phenomenon of interrelated demand. These constraints—no less than the availability of reasonable substitutes—limit a firm's ability to unilaterally raise prices or reduce output.

A growing body of economic literature explores how many tests of market definition and market power fail to account for these constraints and explains how to ensure those tests can be carefully applied to better reflect the competitive realities that multi-sided firms face.[3]

1. Multi-sidedness can have important consequences for some of the most commonly used tools of market definition. Consider the so-called "hypothetical monopolist test." Courts, the Federal

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[3] Growing awareness of the importance of multi-sided dynamics has already led the European Court of Justice to hold that courts applying EU law must consider the effects that a restraint will have on all relevant sides of a multi-sided market. *See* Case C-67/13P *Groupement des Cartes Bancaires* v. *Comm'n*, 2014 E.C.R. I-, ¶¶ 78-79.

Trade Commission, and the Department of Justice often start the process of market definition by asking whether a hypothetical monopolist acting in the proposed market could profitably impose a small but significant, non-transitory increase in price (a SSNIP). *See, e.g.*, *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 277-278 (6th Cir. 2014) (applying hypothetical monopolist test to Section 1 claim); *Coastal Fuels of Puerto Rico, Inc.* v. *Caribbean Petroleum Corp.*, 79 F.3d 182, 197 (1st Cir. 1996) (same with regard to Section 2 claim); Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* 8-13 (2010). If a SSNIP would succeed, the proposed market is the appropriate starting point for an assessment of market power. If the SSNIP would fail, the proposed market is likely too narrow.

The hypothetical monopolist test usually looks to a single product market. But economists have pointed out that doing so risks both over- and under-estimating the true effects of a SSNIP in a multi-sided market. *See, e.g.*, Alexei Alexandrov et al., *Antitrust and Competition in Two-Sided Markets*, 7 J. Competition L. & Econ. 775, 778 (2011); *id.* at 782-785 (reviewing economic literature on the issue); Filistrucchi et al., *supra*, at 329-333.

A test that looks only at competition for potential customers on one side of the market might make a SSNIP appear profitable for a multi-sided firm. But in reality, the interrelated demand among all sides of the market might mean that a real-world price increase would fail. *See* Alexandrov et al., *supra*, at 778; Evans & Noel, *supra*, at 699-700. Ignoring the other sides of the market could lead a court to find

market power that does not actually exist. *See* Filistrucchi et al., *supra*, at 331.

Moreover, multi-sided firms can face competition from other multi-sided firms as well as from single-sided firms that cater to individual sides of the multi-sided firm's market. Competition among multi-sided firms can magnify the effects of a SSNIP even further as attrition from the first firm enhances the attractiveness of the competing firm. A hypothetical monopolist test that looks only at one side of the market when considering competing firms could therefore significantly underestimate the competitive constraints at play.[4]

Economists have proposed different means of accounting for these dynamics, and the appropriate analysis in any given case will depend on the firm and the conduct at issue, as well as the competitive dynamics that the firm faces. Regardless of the specific methodology advanced, the point is that the tests of market definition and market power applicable to single-side markets may not account for the competitive constraints that multi-sided firms face.

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[4] This Court's decision in *Kodak* is not to the contrary. The Court in that case rejected the argument that Kodak—which sold both copiers and after-sales service—could defeat summary judgment with the argument that it was constrained in the market for service by the risk that customers would purchase different copiers. *See Kodak*, 504 U.S. at 470-471. Nothing in the Court's opinion suggested such constraints were irrelevant as a matter of law. Rather, the Court stressed the importance of "examin[ing] closely the economic reality of the market at issue." *Id.* at 467.

2. Multi-sidedness also has implications for common measures of market power. Take the example of pricing above marginal cost. Because prices in perfectly competitive one-sided markets will tend towards marginal cost, courts often define market power as "the power to charge a price above cost" and maintain a profit. *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 783 (7th Cir. 1999); *E. Food Servs., Inc.* v. *Pontifical Catholic Univ. Servs. Ass'n*, 357 F.3d 1, 6 (1st Cir. 2004) (similar).

But a comparison of price and marginal cost on one side of a multi-sided firm is a poor gauge of market power. Prices in multisided markets vary with the marginal costs of the firm as a whole on *all* sides of the market—"a very different result than pricing in one-sided markets." Evans, *supra*, at 343; *see* Julian Wright, *One-sided Logic in Two-sided Markets*, 3 Rev. Network Econ. 44, 47-48 (2004).

For the same reason, offering prices *below* marginal cost to one set of customers is not necessarily evidence of predatory pricing. The canonical test of predatory pricing requires proof "that the prices complained of are below an appropriate measure of [the defendant's] costs" and that "the [defendant] ha[s] a dangerous probability of recouping its investment in below-cost prices." *Weyerhaeuser Co.* v. *Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 318-319 (2007) (alterations omitted) (quoting *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U. S. 209, 222, 224 (1993)). That test makes little sense, however, when a firm is effectively "selling" the ability to reach users on one side of the market to the other. So a firm operating in a multi-sided market,

such as a restaurant reservation booking site, may choose to allow consumers to use the site without charge in order to stimulate demand, which would allow it to charge restaurants fees to secure reservations.

Finally, multi-sidedness can make traditional market-share measures of market power less useful. Consider a video-streaming service that lets users stream different broadcasters' content for free. The firm may acquire an large share of the market for viewers, but might have a relatively small share of the advertising side of the market where the firm earns its revenue. Value-based measures of market share are even less helpful, since users may receive services they value greatly—such as free searches—for nothing. *See* Evans & Schmalensee, *supra* at 422.

3. These nuances are features of an appropriate inquiry, not flaws, as petitioners suggest (at 18-19). This Court has stressed the importance of looking "closely [at] the economic reality of the market at issue," especially when examining the "responsiveness of the sales of one product to price changes of the other." *Kodak*, 504 U.S. at 467 (internal quotation marks omitted). And it has rejected simplifying "presumptions" that paper over "actual market realities." *Id.* at 466-467. That multi-sided markets are complex is not a reason to subject multi-sided firms to a one-sided-firm analysis that is divorced from the economic realities they face.

C. Courts Must Consider Multi-Sidedness In Assessing A Plaintiff's *Prima Facie* Case

The tests of market definition and market power are critical to a Sherman Act plaintiff's burden to

prove "the potential for genuine adverse effects on competition" as part of their *prima facie* case. *Ind. Fed'n of Dentists*, 476 U.S. at 460. Yet the foregoing discussion shows that reflexively applying the standard analytical toolkit to multi-sided firms—without taking care to assess the underlying antitrust principles—flouts this Court's repeated admonition that courts look to "actual market realities." *Kodak*, 504 U.S. at 466.

It is no answer to suggest, as the United States does (Br. 35), that defendants can invoke the economic differences between single- and multi-sided firms as part of their case for procompetive justifications. Antitrust plaintiffs, including the United States, bear the burden of proving an adverse effect on competition *before* the burden shifts to the defendants. Courts must therefore assess "the challenged restraint's impact on competitive conditions" at the *prima facie* stage—a task they cannot perform if they lack an accurate picture of those conditions. *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 688 (1978). Without accounting for the effects of interrelated demand, courts examining multi-sided firms might not be able to establish the appropriate market or accurately gauge the extent of a firm's influence over price and output.

Nor does it make sense to think of those effects as "procompetitive justifications" for anti-competitive conduct. To be sure, multi-sided firms may have strong procompetitive justifications for their conduct, including that they often "enable[] a product to be marketed which might otherwise be unavailable." *NCAA* v. *Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 102 (1984); *see* Evans & Schmalensee, *supra*,

at 409. But interrelated demand and the special relationship between prices and costs that may exist in multi-sided markets go directly to the question of whether a restraint threatens competition in the first place—that is, whether there are any anticompetitive effects to balance against the procompetitive benefits. Those considerations cannot be deferred to a later stage of litigation.

III. IGNORING THE EFFECTS OF MULTI-SIDEDNESS THREATENS INNOVATION

Without careful attention to the range of dynamics that multi-sided firms face in their operations, a decision in this case could inadvertently discourage innovation. Multi-sided firms have proliferated over the last two decades, bringing market participants together in ways that were never possible before and providing tremendous benefits to consumers and small businesses alike.

A rule that fails to account for dynamics of multi-sided firms and the interplay among the different sides of those markets would jeopardize these developments. Instead of a balanced assessment of their conduct in light of competitive realities, petitioners and the United States would subject multi-sided firms to a skewed analysis that may ignore some of the most significant competitive constraints they face.

This Court has warned that "[t]he cost of false positives" is an important consideration in crafting antitrust rules. *Trinko*, 540 U.S. at 414. A rule that deferred any consideration of multi-sidedness until after the plaintiff's *prima facie* case would dramatically increase the risk of false positives, encourage meritless litigation, penalize healthy

competition, and deter the development of valuable new products and services.

If, for example, a court could find market power based on the simple fact a multi-sided firm charges one set of customers a price that exceeds marginal cost, while providing services to another set of customers for free, it may prevent a video-streaming service (or traditional television network, for that matter) from attracting enough viewers to attract the highest quality content providers—even though the prices charged to *both* sides of the firm were reasonably related to the firm's *total* variable costs. And if a court defined the relevant market for a travel-planning firm based only on the number of free users it attracted—ignoring the firm's need to retain airlines as paying sellers—it could condemn as a monopoly a company that could not profitably adopt even a trivial increase in price.

Multi-sided firms such as some of CCIA's members exemplify these phenomena: some base pricing and output decisions on the complex interrelationships between the various sides of the markets they serve. And they compete vigorously with each other and with single-sided businesses that serve the same customers. This Court's precedents have consistently emphasized that the Sherman Act requires a focus on "actual market realities." *Kodak*, 504 U.S. at 466. That maxim should guide the Court here.

CONCLUSION

The judgment of the Second Circuit should be affirmed.

Respectfully submitted,

NEAL KUMAR KATYAL
Counsel of Record
JESSICA L. ELLSWORTH
EUGENE A. SOKOLOFF
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

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In the Supreme Court of the United States

STATES OF OHIO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MONTANA, RHODE ISLAND, UTAH, AND VERMONT,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, AND AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICI CURIAE* JOHN M. CONNOR, MARTIN GAYNOR, DANIEL MCFADDEN, ROGER NOLL, JEFFREY M. PERLOFF, JOSEPH A. STIGLITZ, LAWRENCE J. WHITE, AND RALPH A. WINTER IN SUPPORT OF PETITIONERS

ANTHONY J. BOLOGNESE
Counsel of Record
BOLOGNESE & ASSOCIATES, LLC
1500 JFK Boulevard, Suite 320
Philadelphia, PA 19102
(215) 814-6750
ABolognese@Bolognese-Law.com

Counsel for Amici Curiae

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J. Rochet and J. Tirole, *Two-Sided Markets: A Progress Report*, Rand J. of Econ. 37(3) (2006)..... 9
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M. Rysman, *The Economics of Two-Sided Markets, J. of Econ. Perspectives* 23(3) (2009) 9
S. Salop & S. Morton, *Developing an Administrable MFN Policy*, Antitrust (2013) 12
S. Schuh et al., *An Economic Analysis of the 2011 Settlement Between the Department of Justice and Credit Card Networks*, J. of Competition Law & Econ. (2012) 12

INTEREST OF *AMICI CURIAE*

The *amici* are eight economists – scholars and experts in competition, industrial organization, and the economic analysis of antitrust issues.[1] *Amici* respectfully submit that sound antitrust economics supports judgment in favor of the Petitioners. The Second Circuit's ruling sets new and flawed antitrust standards for analyses of two-sided markets, standards that are based on a fundamental misunderstanding of the economics of such markets. Unless corrected by this Court, the decision will result in anticompetitive distortions not only in the credit card industry, but also in the many extant and emerging industries that involve or are alleged to involve two-sided platforms.

SUMMARY OF ARGUMENT

The question presented to this Court is whether, under the "Rule of Reason," a showing that

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[1] The attached Appendix identifies the *amici*. The amici include Joseph Stiglitz, who is currently consulting and is an expert witness for a number of national supermarket and drugstore chains that have challenged Amex's, Visa's, and MasterCard's restraints in related lawsuits pending in the District Court. See Appendix.

No counsel for a party authored this brief in whole or in part, and no party or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

Counsel for Petitioners and Respondents have consented to the filing of this brief through blanket consents to the filing of Amicus Curiae briefs.

the Amex Merchant Restraints[2] suppressed price competition on the merchant side of the credit card platform suffices to prove anticompetitive effects and thereby shift to Amex the burden of establishing any procompetitive benefits from the Restraints? The Second Circuit held that for the Government to prove that the Amex Restraints were anticompetitive, the Government bore the burden to show *not just* that the restraints had anticompetitive pricing effects on the merchant side, *but also* that those anticompetitive effects were not outweighed by any benefits on the cardholder side.

The amici submit that the proper analysis of the Amex Restraints is straightforward – the Restraints impede competition among credit cards in the pricing of their services to merchants. Demonstration of this paradigmatic anticompetitive effect is, amici submit, sufficient to shift to Amex the burden of demonstrating procompetitive effects from its Restraints.

In this brief, amici show that the Second Circuit was incorrect in its analysis of two-sided platforms and markets. But, more importantly, amici submit that it is unnecessary for a court to delve into the difficult economics of two-sided

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2 The Court of Appeals summarized the Amex Merchant Restraints (or "Amex Restraints" or "Restraints") as "barring merchants from (1) offering customers any discounts or nonmonetary incentives to use credit cards less costly for merchants to accept, (2) expressing preferences for any card, (3) disclosing information about the costs of different cards to merchants who accept them." Pet. App. 4a.

markets in the first stage of a Rule of Reason analysis of the Amex Restraints. Contrary to the Second Circuit's ruling, the proper analysis in the first stage of the Rule of Reason analysis is not whether the two-sided aspects of Amex's business lead to impacts from its Restraints on both sides. Rather, the critical determination is whether a restraint that impedes price competition among credit card companies regarding merchant fees demonstrates an anticompetitive impact, thus satisfying plaintiffs' initial burden. Amici submit that the answer is clearly that it does. If the two-sided nature of Amex's business somehow justifies such suppression of horizontal price competition at the merchant level, this should be for Amex to demonstrate in the second stage of the analysis.

A two-sided platform is characterized by a seller that brings together two different sets of users (the two sides), *and* where increased usage on each side benefits the other side (referred to in economics as two-sided externalities).[3] The Court of Appeals assumed that because Amex must attract both cardholders and merchants, it must be a two-sided platform with the requisite significant feedback effects from Amex's merchant pricing on cardholders and vice versa. But the fact that a firm such as Amex must attract two sets of users does not mean there are such feedback effects. The Court of Appeals

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[3] The Court of Appeals characterized this as "price changes on one side can result in demand changes on the other side." *U.S. v. Am. Express Co.*, 2016 WL 5349734, at *3 (2d Cir. Sep. 26, 2016). This is not strictly correct as it is increased usage on one side that increases value on the other side. Of course, typically changes in prices change usage.

allows for a very broad conception of two-sided platforms, one under which almost every firm—ranging from grocery stores (who need food buyers and food producers) to delivery companies (who need senders and receivers)—could qualify as a two-sided platform.[4]

Regardless, assuming Amex is a two-sided platform, then its pricing on one side of its platform would impact demand on the other side. This complexity is perhaps what led the Court of Appeals to rule that the assessment of the anticompetitive impact of restraints supporting high prices to one side must consider the impact on the other side. But that is certainly not a sufficient basis to change established antitrust analysis. For example, for any firm selling complements (complements are products used together like tennis rackets and tennis balls), changes in the price of one good will change the demand for the other good.[5] The fact of such pricing interrelationships does not imply that the proper analysis of an anticompetitive act regarding one product must take account of the impact on the other products. Nor do such pricing interrelationships imply that the relevant economic market for

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[4] Before reconfiguring the established and well-understood Rule of Reason analysis for a mature network like Amex, careful analysis should be conducted to ascertain the significance of any feed-back effects from pricing to each side from the other side (two-sided externalities), and whether there are ways of appropriately incorporating the analysis of allegedly two-sided markets within the standard Rule of Reason framework.

[5] This positive cross-elasticity of demand is what economically defines complements.

assessment of competitive impact should include all goods impacted by a price change of one product.

While the Court of Appeals ruling purports to be based on the economics of "two-sided markets," it departs sharply from prior antitrust analyses and rulings involving two-sided markets. Formal economic analysis of two-sided platforms is relatively new, but antitrust analysis of industries involving two-sided platforms is not. For over fifty years, courts have analyzed the competitive impact of restraints on one side of a two-sided platform by focusing on how competition among competing suppliers on that side of the market is affected.[6]

In this case, the Court of Appeals departs from this standard analysis by requiring a plaintiff to show that a competitive harm on one side of a platform (here the merchant side) is not offset by purported benefits on the other side of that same

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[6] *See, e.g., Times Picayune Pub. Co. v. United States*, 345 U.S. 594, 610 (1953) (confining competitive analysis to "advertising market, not in readership" while noting that "every newspaper is a dual trader in separate though interdependent markets."); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (analysis of restraints on entry of competing browsers).

Under the Court of Appeals ruling, in *Times Picayune* at the first stage of the Rule of Reason analysis, the government would have to show that any benefits to readers from high advertising prices do not outweigh the anticompetitive effect of those high prices. In *Microsoft*, the government would have to show that any benefits to, for example, application developers from Microsoft's monopoly over browsers, do not outweigh the adverse effects of that monopoly.

platform (the cardholder side). To the extent that a Court departs from established Rule of Reason analysis and allows harms and benefits to two distinct sets of consumers to be balanced, an approach amici do not endorse, then Amex, as the proponent and enforcer of the Restraints, is in the best position to understand and quantify any cognizable benefits to cardholders resulting from any relevant two-sidedness of its business. Requiring the government or a private plaintiff victim of a restraint of trade to prove that its harm is not offset by benefits to third parties would create an unwarranted, inefficient and unreasonable burden.

If not stymied by the Amex Restraints, credit card platforms (Amex, Visa, MasterCard, and Discover) should compete against each other on price. The price competition would be on each side of the platform. Each credit card platform offers a pair of prices consisting of the price charged to merchants for the use of the platform's card acceptance services, and a price charged to cardholders (including benefits in the form of "rewards" and other charges). One platform may choose to compete by offering a high merchant price and high rewards to cardholders. Another platform may choose to offer lower merchant fees and lower cardholder rewards, expecting that merchants will steer its customers to that platform's cards by offering discounts or other incentives at the point of sale due to the comparatively low merchant fees.

With competition in the market, each network chooses its preferred price pair. Market forces, which can include differential pricing or other benefits such as a preferred checkout line at the

point of sale, would sort out how much of that platform's services will be demanded – that is, its success in the market. The Amex Restraints directly interfere with this competition among the credit card platforms. With the Amex Restraints in place, a rival credit card platform or a new entrant that attempts to compete against Amex with lower merchant fees will likely be unsuccessful. The Amex Restraints prohibit merchants from passing that low fee on to the cardholders – the people who chose which card to use. Thus, a credit card platform with lower merchant prices than Amex can garner little additional sales from its low merchant prices; it will be driven by the Amex Restraints towards Amex pricing.

Competition requires that (1) credit card platforms can freely choose their prices, (2) consumers have choices of card network rewards versus the merchant-offered discounts and incentives, and (3) competitive market forces determine how much of alternative platforms' services will be demanded. The Amex Restraints prevent the price system and competition from working properly. Prices should guide decision making. But the Restraints prevent the merchant from reflecting the high Amex price it pays in the prices it charges customers for the use of this high-priced payments service.

Amici respectfully submit that the proper analysis of restraints imposed on one side of a two-sided platform is the established Rule of Reason analysis previously recognized by the Second Circuit and adopted by many other Circuits. Under this standard analysis, the first step is to determine if a

restraint, whether on one or both sides of a platform, injures competition between and among platforms on the "side" where the restraint is imposed.[7] If a plaintiff satisfies this showing, the defendant can then show procompetitive benefits that may or may not offset the anticompetitive impacts.[8]

The Second Circuit erred by disregarding the critical antitrust issue – the impacts of the Amex Merchant Restraints on competition among credit card platforms. The Second Circuit erroneously (1) assumed that the characterization of the Amex service as a two-sided platform should fundamentally change the traditional antitrust principles that govern the Amex Restraints, (2) misunderstood the nature of competition in two-sided markets, (3) incorrectly defined the relevant market in which to assess anticompetitive impact as including both merchants and cardholders, and (4) presumed that reductions in Amex cardholder prices are a procompetitive benefit, and then placed the burden on plaintiffs to prove that the harm from supra-competitive merchant fees are not outweighed by benefits to third-party cardholders.

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[7] In the credit card market, all firms operate platforms dealing with both sides of the market. Amici hence refer to competition among platforms. In other settings, some market participants may operate on only one side. Generally, the proper inquiry at the first stage would be on the side where the restraint is imposed.

[8] As amici explain below, the impact on the prices charged to the other side of the platform is not a procompetitive benefit.

If the ruling of the Court of Appeals stands, the adverse impact will be substantial. Credit card platforms process trillions of dollars of transactions in the United States annually. More importantly, firms operating in two-sided markets using the internet, such as Amazon, Uber, Facebook, Google, and Airbnb, are multiplying in number and size. The Court of Appeals decision gives firms in these rapidly developing markets latitude to act anticompetitively through an action on one side of their platform as long as they can point to some indirect or secondary benefit on the other side of the platform populated by a different set of consumers.[9] The Court of Appeals ruling will make analyses of such conduct needlessly complex and, perhaps, effectively place such restraints beyond reach of the antitrust laws.

ARGUMENT

I. "TWO-SIDEDNESS"

As noted, a two-sided platform brings together two sets of users, in a situation where the usage by each set (side) significantly affects the other set (two-sided externalities).[10] Two-sided industries have included newspapers, television and radio, computer operating systems, dating services, and travel

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[9] All firms that intermediate transactions between suppliers and consumers can raise aspects of two-sidedness.

[10] *See* Jean-Charles Rochet and Jean Tirole, *Two-Sided Markets: A Progress Report*, Rand J. of Econ. 37(3) (2006), pp. 645-67; M. Rysman, *The Economics of Two-Sided Markets*, *J. of Econ. Perspectives* 23(3) (2009), pp. 125-143. The literature mainly focuses on the optimal pricing of a platform, and not the more difficult issue at hand – the effect of restraints on competition among platforms.

reservation services.[11] In such two-sided industries where price on one side affects usage on the other, the profitable pricing of the two-sided platform is a simultaneous two-sided price-pair decision.

The Court of Appeals emphasized that Amex must attract both cardholders and merchants to its network.[12] But this does not distinguish Amex from other firms that need to attract two different sets of users. Nearly *any* firm intermediating between two groups could offer the Court of Appeals' flawed analysis that a restraint that raises the firm's price to the one side might pass antitrust muster if the restraint provides the firm with revenue that it spends on enhancing the quality of the products it offers to the "other side." A new antitrust doctrine should not follow from a mere labeling of a conventional impact just because it rises in a two-sided platform.[13]

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[11] We write "have included" because as two-sided platforms mature, the externalities from each side to the other can become unimportant and insignificant, rendering the two-sidedness of no relevance. For example, a mature flight reservation system may not attract another airline if it adds more users, and vice versa. If so, there are no remaining significant two-sided externalities. *See U.S. Airways, Inc. v. Sabre Holdings Corp.*, 2017 U.S. Dist. LEXIS 40932 at 32 (S.D.N.Y. Mar. 21, 2017).

[12] *See* Pet. App. 49a-50a.

[13] In a recent paper co-authored by one of the *amici*, the authors conclude that "[t]he two-sidedness of credit card markets does not require a new set of economic principles for assessing competition policy because the difference between the credit card setting and a conventional one-sided market is essentially a matter of labeling.... Creating different legal rules for the same economic conduct depending on whether the

The economic literature analyzing two-sided platforms is new, complex, and evolving.[14] If the Court of Appeals were correct that different and novel economic analysis is required in two-sided markets – a proposition with which *amici* disagree – such analysis should be applied only after a rigorous and careful demonstration that two-sided market characteristics exist and are important to the competitive impact of a restraint.

This is especially important in the case of Amex. Only recently has the economic literature considered the impact of restraints on competition that allow a firm like Amex to charge higher prices to one side (here, merchants), which results in increased prices charged to *all* the merchants' customers, and which, through competition on the other side (cardholders), may result in lower prices to

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market can be described as one-sided or two-sided is a mistake that could lead to widespread confusion in the evaluation of vertical restrictions." D. Carlton & R. Winter, *Vertical MFN's and the Credit Card No-surcharge Rule*, at 40 (working paper available at https://goo.gl/kKd2Ck).

[14] As an example of its incomplete understanding of aspects of two-sided platforms, the Court of Appeals cites a 2013 working paper by Filistrucchi et al. (Since published in J. Comp. Law & Econ., 2014.) *See* Pet. App. 7a n.3 (citing Lapo Filistrucchi et al., *Market Definition in Two-Sided Markets: Theory and Practice* 5). The analysis therein emphasizes a possible important distinction for competitive analysis between two-sided *transactions* markets (where, as with payment cards, the two sides directly interact with one another), and two-sided *non-transactions* markets (where, like newspapers, the two sides do not interact with one another). While noting this paper, the Court of Appeals court simply disregards the distinction.

that side.[15] The Court of Appeals analysis and ruling fails to account for this recent learning.[16]

Instead, the Court of Appeals took a novel and unprecedented approach to analyzing the competitive impact of the Amex Restraints. Rather than determining whether the Restraint injured competition among platforms – that is, among competing credit card firms – on the one side, the court ruled that the proper antitrust analysis must "consider the two-sided net price accounting for the effects of the [restraints] on both merchants and

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[15] The price to the cardholder side may include annual fees, transactions fees net of discounts, and rewards. There can be no presumption that restraints leading to higher prices charged to merchants result in lower cardholder prices, much less an overall lower "total price." Nonetheless, as Amici emphasize below, even if there is a reduction in the total price, that does not imply increased efficiency.

[16] The recent economic literature finds that restraints such as the Amex Restraints "typically raise platform fees and retail prices, and also curtail entry or skew positioning decisions by potential entrants pursuing low-end business models." A. Boik & K. Corts, *The Effects of Platform Most-Favored Nation Clauses on Competition and Entry*, J. of Law & Econ., Abstract (2016). *See*, also, S. Schuh et al., *An Economic Analysis of the 2011 Settlement Between the Department of Justice and Credit Card Networks*, J. of Competition Law & Econ. (2012); S. Salop & F. Scott Morton, *Developing an Administrable MFN Policy*, Antitrust (2013); Lear, *Can "Fair" Prices Be Unfair? A Review of Price Relationship Agreements*, UK Office of Fair Trading, Paper #1438 (2012); J. Johnson, *The Agency Model and MFN Clauses* (Jan. 25, 2017) (available at https://goo.gl/Vbj3tV); D. Carlton & R. Winter, *Vertical MFN's and the Credit Card No-surcharge Rule* (available at https://goo.gl/kKd2Ck).

cardholders."[17] Furthermore, the Court held that it was the plaintiffs' burden to show that the Amex Restraints had an adverse net effect, defined by the Court as the sum of the prices to merchants and cardholders. Only after the plaintiff has passed this hurdle would Amex be obligated to come forward with any evidence of a procompetitive justification.

II. PLATFORM COMPETITION IN TWO-SIDED MARKETS

The Court of Appeals' emphasis on the net two-sided price does not assess the competitive impact of the Amex Restraints. If a market were demonstrated to consist of two-sided platforms, and if benefits to consumers using one side of a platform (here cardholders) result from restraints that harm the other side (merchants), then a simple summing of these benefits and harms is *not* informative as to the restraint's impact on competition.

The correct approach is rather to determine whether a restraint on one side of a two-sided market interferes with competition among platforms in the market. The competitive impact of restraints such as those imposed by Amex – restraints that directly alter and impede horizontal competition among platforms – is properly demonstrated by showing the interference with competitive setting of the platforms' pricing, whether on one side or both. The Court of Appeals disregarded this most critical, and amici submit dispositive, economic issue – how the Amex restraints affect competition among Amex, Visa, MasterCard, Discover, and potential new

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[17] Pet. App. 49a.

entrants by distorting the competitive process leading to the platforms' prices.[18]

To better understand competition in two-sided markets, consider the example of platforms intermediating between hotels and travelers. These platforms can be two-sided if the demand for the services by travelers increases when more and better hotels use the service, and vice versa. If a platform lowers its price to travelers and this increases the number of travelers using the platform, then the platform can be more valuable to hotels. Similarly, lowering the platform fee charged to hotels can increase the number of hotels using the platform, making the platform more valuable to travelers. In this situation, the hotel booking service providers are competing in a two-sided market.

Two-sided platforms compete, in part, via the prices offered by each platform to each side they serve. For example, one hotel booking service may charge a high price to hotels and a relatively low price to travelers, while other platforms may expect more equal prices to be more profitable, resulting in a better mix of hotels and travelers. Competition is likely to result in competing platforms offering different price pairs, and those offering the price-pairs that best satisfy consumer preferences will thrive.

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[18] Visa and MasterCard operate as what is called four-party systems (cardholders, merchants, issuers, and acquirers, *see* Figure 2 at Pet. App. 55a-56a) in which the Visa and MasterCard platforms deal with acquiring banks that compete for merchants and issuing banks that compete for cardholders. This difference from Amex and Discover does not impact our analysis.

The important economic point is that in two-sided markets, the relevant competition occurs at the platform level (*i.e.,* competition among the credit card companies). A competitive two-sided market, through consumers' choices, will effectively decide the preferred and competitive prices to each side, which, of course, determines the overall "price levels" (the sum of the prices) for the two sides. It is this platform competition that is directly interfered with by the Amex restraints on the merchant side of the Amex platform.

Rather than asking whether the Amex Restraints prevented competitive market forces from determining the price pairs offered by the competing credit card platforms, the Court of Appeals focused only on the impact of the Amex Restraints on the *sum* of the Amex prices to both sides of its platform. This is a fundamental economic error. Whether the sum of the prices remains the same or even falls does not indicate whether restraints are or are not anticompetitive. The total price, or change in total price, simply does not indicate whether the restraints are distorting and interfering with competition among platforms. When restraints hamper the process of platform competition, anticompetitive harm follows because the restraints alter the price pairs themselves, regardless of whether the sum of the prices increases, decreases, or remains unchanged.[19]

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[19] *See* P. Areeda & H. Hovenkamp, Antitrust Law § 562e, p. 101 (Supp. 2017) (stating that the Court of Appeals erred because "competition should choose the optimal mix of revenue between the two sides").

III. THE AMEX RESTRAINTS HARM HORIZONTAL COMPETITION AMONG CREDIT CARD PLATFORMS

The Amex Restraints bar merchants purchasing Amex services from differentially pricing the use of Amex cards versus other credit cards. The Restraints even bar merchants from providing their customers with accurate information about the prices charged to merchants by Amex and alternative cards. This interferes with transparency in prices, a hallmark of competitive and efficient markets. The Amex Restraints are vertical restraints, imposed by a supplier on its customers. However, the Amex vertical restraints have direct horizontal effects because they interfere with horizontal competitors' pricing.

The required competitive analysis of a vertical price restraint is set forth in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), and summarized in the Court of Appeals' decision.[20] *Leegin* concerned resale price maintenance (RPM). This well-established analysis of RPM finds the first stage of the Rule of Reason satisfied by showing an increase in the retail price. The burden then shifts to the supplier imposing the restraint to show offsetting procompetitive benefits. The Court of Appeal failed to follow this approach, and its failure to do so is not justified by sound economic principles.

With RPM, the suppression of competition at the retail/merchant level, is a cost to the supplier imposing the restraint, because the direct effect is

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[20] Pet. App. 30a-31a.

reduced demand for the supplier's product from the higher retail price. Therefore, to be of benefit to the supplier, the decision to impose RPM can be presumed to have some non-price, demand-enhancing effects. In contrast, Amex's suppression of price competition at the retail/merchant level provides first-order benefits to Amex – the Restraints effectively impede its credit card competitors from competing against Amex's price to merchants. Because of this direct and intended reduction in horizontal price competition among Amex and its competitors, the Amex Restraints, unlike RPM, cannot be presumed to be motivated by non-price, overall demand-enhancing effects.

Additionally, the direct impact of RPM on competing suppliers is to increase the demand for the competitors' products. In contrast, the Amex restraints provide no direct benefits to Amex's platform competitors; rather, the restraints directly interfere with the other credit card platforms' ability to compete with Amex in pricing to merchants. Yet for analysis of RPM, simply showing an increase in the retail prices to the buyers is sufficient to satisfy the first prong of the Rule of Reason analysis – an anticompetitive impact. It is not sound economics to reject the rebuttable presumption that the Amex Restraints are anticompetitive simply because the services may be two-sided.

The practical effect of the Amex Restraints is to force merchants that purchase Amex services (and pay the merchant fee) to set no (or equal) prices for the use of all cards, regardless of their relative cost to the merchant. The result is that merchants' customers paying with credit cards perceive no

difference in selecting one credit card rather than another, and the customers will be motivated to choose the card considered to offer the highest cardholder benefits. Consequently, as the district court below correctly found, if a payment card platform seeks to compete for transactions with Amex by offering an identical net price, but with lower prices on the merchant side, then its effort will be impeded, not because there is no demand for the platform's services, but because the Amex Restraints effectively suppress the use of prices to drive demand on the merchant side.[21] Therefore, platforms (such as Discover) that attempt to compete with Amex by charging lower merchant fees and equal or possibly lower rewards will realize little benefit from the low merchant fees.[22] As a consequence, the Amex Restraints suppress horizontal competition among credit card platforms to increase transactions by charging lower merchant prices. Similarly, the Amex Restraints impede competition on the cardholder side by preventing platforms from offering lower prices to merchants in exchange for merchants offering more immediate and more valuable benefits or discounts to cardholders at the point of sale.

As a result, with the Amex Restraints in place, competing platforms will be motivated to raise their merchant price – that is, they will be driven towards the Amex business model. In so doing, the platforms will have to abandon other competitive business

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21 *See* Pet. App. 194a-203a.

22 *See* Dist. Ct. Op., Pet. App. 203a-207a (holding that Amex's merchant restraints effectively deny other networks the opportunity to pursue a business model that differentiates itself by offering merchants a low price for greater volume).

models that they, the retail consumers, the cardholders, and the merchants might prefer.[23] The Amex Restraints directly interfere with competitors' ability to compete with alternative platform models offering different and potentially efficient price pairs. This is regardless of whether such competitive price pairs have equal, lower, or even higher total two-sided net prices.

The competitive impact of merchant pricing restraints like Amex's on new entry is also far reaching. The Amex Restraints result in all credit card networks competing for transactions mainly through the issuing side of the platform where card issuers (Amex, Discover, and the thousands of Visa and MasterCard issuing banks) provide cardholder benefits at some future point in time. Cardholder benefits can be a way to reduce the net prices paid by the cardholders. But at best, the benefits are a discount on the credit card bill from the issuer, and the discount accomplishes a price reduction only with a lag in time. The Amex rules prohibit a merchant from accepting payment cards from a competing network that offered rewards in the form, for example, of a point-of-sale discount or other benefits received at the time of the sale such as a preferred checkout line. Under the Amex Restraints, any such point-of-sale benefits would be considered differential pricing, which is not allowed. Thus, the Amex Restraints directly interfere with possible entry of innovative and potentially efficient alternative

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[23] *See* Dist. Ct. Op., Pet. App. 216a-217a (finding that without the Amex Restraints, all four card networks' merchant prices would decrease).

platform pricing systems, and this adverse entry effect of the restraints occur in an industry in which the Court of Appeals notes "continues to be characterized by formidable barriers to entry."[24] This important anticompetitive impact was not given proper weight by the Court of Appeals.[25]

With Restraints in place that impede horizontal competition regarding pricing to merchants, competition on the cardholder side may or may not increase, and such competition might or might not result in a change to the net prices summed over the two sides. However, such a reduction in the cardholder price, if it occurs, is not a "pro-competitive" or an efficiency-enhancing benefit that offsets the interference with competition on the merchant side. It is, rather, a further economic distortion and inefficiency directly due to the Amex Restraints, enhancing Amex's market power and ability to charge supra-competitive prices and impose anticompetitive restraints.

The Court of Appeals recognized that in two-sided markets, a platform must "find an effective method for balancing the prices on the two sides of

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[24] Pet. App. 17a.

[25] The Court of Appeals described Amex's entry strategy in the 1950s – "Amex ... attracted merchants by setting its merchant fee slightly lower than the contemporary Diner's Club merchant fee." Pet. App. 11a. The Amex Restraints protect Amex from other competitors following this same entry strategy.

the market."[26] This is the essence of competition in two-sided markets – identifying and offering a price pair that attracts both sides to use the platform. Selecting and offering a preferred price pair, however, is quite different from the situation in which restraints on one side of the market allow for price increases that, through competition on the other side, may lead to price reductions to the second side. Even if the total two-sided price were unaffected, which is unlikely, the resulting price pair is distorted, other platforms' pricing is distorted, and, as discussed further below, the higher merchant fees distort merchants' prices to all their customers.

The potential adverse consequences of the Court of Appeals' approach – in which indirect effects on the second side of a two-sided platform must be taken into account in the initial assessment of anticompetitive effects – can be readily understood by viewing the court's analysis through the lens of traditional anticompetitive conduct. Consider a case in which Amex, Visa, MasterCard, and Discover agree to fix prices by charging higher and perhaps equal merchant fees. The obvious anticompetitive harm is the direct interference in platform competition regarding the prices paid by merchants. And with merchant restraints in place like those of Amex, which effectively restrain other credit card platforms incentives to offer lower merchant prices, competition through entry cannot solve the problem. However, if this hypothetical cartel of credit card platform suppliers does not control competition on

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[26] Pet. App. 8, n.4 (citing J. Rochet & J. Tirole, *An Economic Analysis of the Determination of Interchange Fees in Payment Card Systems*, 2 Rev. Network Econ. 69, 71 (2003)).

the cardholder side, then the result is likely to be increased cardholder benefits with reduced cardholder prices, and in the long run, perhaps (but unlikely given the small number of credit card competitors) full dissipation of all the profits earned from the high merchant fees. There is no reasonable basis to consider the dissipation of profits from price fixing through competition on one side of the platform to be an offsetting procompetitive benefit from fixing the price on the other side.[27]

There is substantively no economic difference between the dissipation of profits from merchant fees propped up by the Amex Restraints compared to the dissipation of profits from price fixing. In addition, the hypothetical collusive price fix among credit card platforms would not be considered benign if the "net" price were unchanged because of the full dissipation of the cartel profits extracted from the merchant side through competition on the cardholder side.[28] The outcome of "competition" with restraints such as those imposed by Amex is little different from what would emerge from the collusion example – a non-

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[27] Consider, for example, increased the product quality that will be expected in a cartel that can control price more effectively than product amenities. The increased product quality does transfer some of the cartel profits from the cartel members to the buyers. But this also results in a welfare loss, in that the buyers' value of the increased quality is lower than that costs incurred to supply that higher quality (otherwise it would be supplied under competition). Thus, society ends up with lower overall welfare for two reasons – 1) higher prices than the efficient level with the resulting loss of consumer surplus, and 2) increased quality that costs more than its value.

[28] That a price fix would likely be judged under a *per se* standard is irrelevant to the economic point.

competitive *price pair* that may or may not alter the sum of the prices.

Whether from collusion or from vertical restraints on differential merchant pricing, Amex and its competitors may benefit during the transition to long-run equilibrium and the full dissipation of profits earned from the supra-competitive merchant prices. Those consumer cardholders that are fortunate enough to meet the credit and income requirements for high rewards cards may also benefit. However, the merchants paying higher prices to Amex, and the merchants' customers using other payment means, are harmed. More importantly, economic efficiency is impeded as price signals are distorted regarding choice of payment means. Customers will be motivated to use their rewards cards even when cash, debit, or check would otherwise benefit them, and customers will be motivated to take inefficient actions to qualify for the high rewards cards.

The Court of Appeals decision would impose on those challenging the Restraints the burden of proving that the harm suffered is not outweighed by any benefits to card holders, on the other side of the platform. This requirement would have substantial adverse impacts on antitrust enforcement. First, as amici have emphasized, the effects on cardholders should not be considered offsetting *procompetitive* effects of anticompetitive restraints directed at merchants. Any such benefits to cardholders flow from the merchant restraints that support the supra-competitive merchant fees. Foreclosure of competition on some consumers should not be justified by some of the excess profits being

dissipated to other consumers as a result of competitive forces somewhere else.

Second, even if offsetting effects are considered, the merchant restraints are imposed by Amex, and Amex is the party best able to understand and quantify any relevant offsetting competitive benefits from its restraints. Perverse incentives would be created if a platform could avoid antitrust liability for harm to one side of the platform as long as the victim could not prove that the spoils were not fully passed on to the other side.

Third, the Court of Appeals overly broad conception of two-sided markets could allow any supplier suppressing retail competition through a vertical restraint to point to the possibility of incentives for higher quality, thus shifting the burden from the defendant where it traditionally has been placed, to the plaintiff. Because suppression of price competition in any context carries the possibility of increased competition in non-price dimensions,[29] antitrust enforcement in these settings would become needlessly complex, expensive, and uncertain.

IV. CROSS-MARKET EXTERNALITIES

The Amex Restraints increase the prices that merchants pay to Amex and thereby raise merchants' costs.[30] The Restraints prevent the merchants from differentially raising retail prices to only Amex

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[29] *See* G. Stigler, *Price and Non-Price Competition*, 76 J. Pol. Econ. 149, 149-54 (1968).

[30] Pet. App. 51a..

cardholders to cover the cost increase those cardholders impose on the merchants. The Amex Restraints then motivate other credit card platforms to raise their prices to merchants, further increasing the merchants' costs.[31] Merchants incurring higher costs in turn raise their prices to all their customers.[32] The result is higher retail prices to all the merchants' customers, including those who use low-cost cash or debit cards. These customers, who tend to have incomes or credit scores too low to qualify for high rewards credit cards, will thus end up subsidizing the rewards of more affluent cardholders.[33] This is further evidence of inefficient pricing and adverse impacts on consumers that are not Amex card users. These harms occur even if Amex passed on all its high merchant fees to cardholders through higher rewards, and they are amplified when other credit card platforms increase their merchant prices and cardholder benefits in response to the Amex Restraints.

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[31] Dist. Ct. Opp., Pet. App. 207a-209a.

[32] The retail markets mainly impacted by the Amex Restraints are competitive to a first approximation such that the cost increase caused by higher merchant credit card fees can be presumed to be fully, or nearly fully, passed on to consumers. However, it is possible that in the full market equilibrium, the final product prices could increase by more the supra-competitive component of the Amex merchant fees. See A. Dixit and J. Stiglitz, *Monopolistic Competition and Optimum Product Diversity*, Am. Ec. Rev., (1997). The significant point is that the analysis of the full effects on consumers of restraints such as Amex's is very complex and places an unreasonable burden on plaintiffs if such full analysis is required.

[33] *Id.* at 210a-212a.

The Court of Appeals requires that analysis in two-sided markets go beyond the direct effects on competition on the side of the platform where a restraint is imposed. If it is economically relevant to consider the competitive impact beyond that side of the platform, then proper analysis should also consider effects beyond the platform itself, as the restraint can have broad and arguably anticompetitive effects on consumers who do not participate on either side of the platform operated by the firm that imposes the restraint.

However, there is a sound economic basis to retain the established Rule of Reason analysis in a two-sided market – a traditional analysis that focuses on the direct effects of the restraint on the targeted side of the platform. If the plaintiff succeeds in demonstrating that the challenged Restraints adversely impact competition among platforms, then the plaintiff's initial burden should be satisfied. With this initial burden satisfied, the defendant should be required to demonstrate not simply that the other side of the platform is affected, but that there is a beneficial impact on competition among platforms – that is, a procompetitive benefit.

In this regard, it is important to distinguish reactive changes on the other side of the market from procompetitive pricing to both sides. A two-sided platform firm may offer a price pair that efficiently subsidizes one side with price above marginal costs to the other side. Consider the classic example of a two-sided market – newspapers, which bring together advertisers and readers. A newspaper may compete by offering free papers to readers with pricing to advertisers above the costs of running

additional ads, or might alternatively try a pricing strategy of high subscription fees with little advertising. With competing newspapers, the market will "solve" efficient pricing, with readers and advertisers choosing their preferred platform based on the value offered.

A more complex situation occurs when the two sides of the market directly interact, for example, hotel booking platforms noted above. Assume one booking service charges high fees to hotels, with low fees to the travelers. When the traveler shows up at the hotel, the service of the platform has been consumed. Hence, when the traveler checks in, the hotel can attempt to "undo" the platform pricing by imposing a charge on the traveler. This describes a classic free riding problem in which the hotels seek to consume the valuable service of the platform that assembles desirable travelers without paying for that service.

Courts have significant experience in addressing vertical restraints that may solve free-riding problems. Consider resale price maintenance discussed above. Once the plaintiff has shown that the restraint causes higher retail prices, the defendant can demonstrate that the RPM is necessary to prevent free-riding that could make point-of-sale services non-viable. And supporting such point-of-sale services can allow the supplier imposing the RPM to compete with other suppliers – a procompetitive impact. Under the standard Rule of Reason approach, the plaintiff can then counter that the procompetitive effect does not outweigh the anticompetitive effect.

In the context of the Restraints, a hotel booking service charging high prices to hotels for its services may argue that a restraint requiring that hotels using its services charge the same price to travelers even if booked through another service is necessary for its viability. However, because of such a restraint, alternative platform models with lower prices to hotels become non-viable. The restraint does not therefore increase competition, but rather supports the business model of a particular competitor, rather than the market deciding the preferred business model.

Like hotels facing high fees from a travel booking service, merchants facing high fees from Amex deal directly with the other side of the market, the cardholders. Absent the Amex Restraints, merchants could attempt to reverse a high merchant price–low cardholder price offering by imposing a charge on the card users at the time of purchase for use of the Amex card. However, it is not clear that there can be any significant free-riding for most merchants. In contrast with hotels, retail merchants deal with many repeat customers. If the value of the Amex services offered to cardholders exceeds any benefit the merchant can offer for use of alternative payment means, then the cardholders will likely, henceforth, patronize merchants that do not levy such charges. Thus, the market is likely to solve the efficient pricing, and the Amex Restraints are unnecessary. Regardless, Amex is certainly in the best position to demonstrate whatever procompetitive benefits it believes might result from its Restraints.

In addition to not allowing the use of prices to steer consumer choices, the Amex Restraints don't even allow the merchants to inform their customers of the costs to the merchants from the customers' choice among credit cards. Far from being the least restrictive means of preventing any (unproven) merchant free-riding, the Amex Restraints impede price competition among platforms for the merchants' business. Such restraints that effectively eliminate competition among horizontal competitors are anticompetitive.[34]

V. MARKET POWER, MARKET DEFINITION AND INSISTANCE

To cause competitive harm, a firm must have market power. "[M]arket power exists whenever prices can be raised above the levels that would be charged in a competitive market,"[35] or whenever a seller can "require purchasers to accept burdensome terms that could not be exacted in a completely competitive market."[36] Direct proof of competitive harm demonstrates market power.[37]

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[34] With the inability of merchants to steer, the credit card merchant prices may continue to escalate to the point where additional increases lead to merchants not accepting the cards. This is analogous to a pure monopolist being constrained in pricing because at high enough prices, customers will stop buying the product.

[35] *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27, n. 46 (1984).

[36] *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 620 (1977).

[37] In *Amex*, the district court found that Amex both possessed and exercised its ability to charge supra-competitive

If there is insufficient direct proof of competitive harm, defining a relevant economic market can be useful to identify the firms that compete in providing the relevant products or services to the affected customers. Having identified the competitors, one can then assess whether a firm or collection of firms controls enough of the market to take actions detrimental to competition and to customers.[38] Market definition is a fact-intensive inquiry guided by economic analysis, and it turns on the commercial realities facing customers who purchase the product or service at issue from the supplying firms.[39]

Relevant market analysis properly focuses on one level of an economic chain and includes the firms that compete to sell the product or service to the customers at that level.[40] This established relevant market analysis has been applied to firms that operate as intermediaries in a distribution or production chain. Retailers are intermediaries in

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prices and impose burdensome terms on the merchants that it would not be able to require in a competitive market. *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 187-207 (EDNY 2015). These findings, which were not disturbed by the *Amex* panel, established market power.

[38] *See* Jonathan Baker, *Market Definition: An Analytical Overview*, 74 Antitrust L.J. 129 (2007).

[39] *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482 (1992); *Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2d Cir. 2001) (Sotomayor, J.).

[40] *See Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 610 (1953).

transactions between suppliers and consumers; manufacturers are intermediaries in transactions between input suppliers and goods purchasers. The fact that such firms transact with two distinct groups does not imply the need to define a two-sided market. The anticompetitive harm that occurs, for example, when retailers collusively raise the prices of final goods sold to customers is properly assessed within the relevant economic market defined by the close substitutes for the final goods—a one-sided market.

Credit card companies compete for merchant transactions and for cardholder usage. The possibility that increased prices on one side (the merchant side) may result in some benefits to the other side should not alter the established market definition analysis. Amex's services to cardholders are in no way substitutes for its services to merchants. And while there may be some interdependence in the pricing to cardholders and merchants, such interdependence in pricing provides no justification for including distinct and non-substitutable services in the same relevant market.[41]

Consider a firm offering complementary services, for example, a pharmacy that dispenses drugs and also offers in-store physician consultation and prescriptions. If that pharmacy can set its prescription drug prices at supra-competitive levels, the demand for, and profit maximizing price of physician services will fall. This is neither a pro-

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41 *See* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 565, at 104 (Supp. 2017) ("[T]he fact that a firm obtains its profits from two different, non-substitutable groups does not serve to place the two groups into the same market.")

competitive offset to the supra-competitive pricing, nor a reason to combine the services for the purposes of assessing market power. If the pharmacy can set supra-competitive prices for prescriptions, it has market power and the sale of prescription drugs is a relevant product market.[42] Analogously, if Amex can set supra-competitive prices to merchants, it has market power, and the sale of credit card services to merchants is a relevant product market.

Here, the Court of Appeals also confused the source of Amex's market power. Amex cardholders may prefer to patronize merchants that offer them effective discounts via high rewards. Indeed, some of the cardholders will switch to competing merchants if one merchant charges for the card use or declines to accept Amex cards. Amex refers to this cardholder loyalty as "insistence."

To understand Amex's market power, consider Amex as a credit payment means supplier that attracts buyers by promising discounts for purchases from merchants. In expectation of such discounts some of the buyers may elect to patronize only merchants that accept Amex, and with only a small

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[42] The Court of Appeals confusion on this issue may result from the fact that in two-sided markets with two-sided externalities, a supra-competitive price to one side cannot be identified without consideration of the other side. This fact, however, does not justify including both sides in the same market. Indeed, a very similar problem is present even when both sides are considered – the combined net prices of the two-sides being equal to combined marginal costs also is not sufficient to imply that either price is competitive.

number of such insistent members,[43] merchants will be incentivized to accept Amex cards even though the Amex fee is above the competitive level.[44]

The implied threat of losing the Amex-insistent card users allows Amex to charge the merchant supra-competitive fees, fees in excess of the costs of providing the payment functions, with some of those fees being rebated via rewards (discounts) to the card users. Amex does "attract customer loyalty" by discounts to those customers, and that loyalty then allows it to set fees to the merchants above the amounts of the discounts to the

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[43] For example, assume a merchant is a typical grocery store with a gross margin of 40%. If the differential costs of accepting Amex or other high reward credit cards is 2% compared to lower costs alternative payment means, then if only 5% or more of Amex cardholders switch to an alternative merchant in response to a 2% charge, the merchant would accept the supra-competitive Amex fee.

[44] The Second Circuit asserted that "[t]here is no meaningful economic difference between 'dropping American Express'... and a decision not to accept American Express in the first place." Pet. App. at 46a-47a. This is incorrect as a matter of economics. The initial participants in Amex will likely increase their sales as some Amex cardholders switch their purchases from non-participants to participants. As participation becomes ubiquitous and nearly all merchants are offering the discount to Amex cardholders, the cardholders will re-sort themselves to their preferred stores independent of the discount, with no change in the merchants' sales. If all competing merchants in a retail sector participate in Amex, the end result is simply the perversion of the price signals related to payment means choices, and price discrimination favoring Amex (and other high reward) card users and disfavoring other customers.

card users.[45] Whether the supra-competitive portion of the merchant fees is or is not subsequently competed away on the cardholder side does not change the fact that Amex is exercising market power in its pricing to merchants. And the exercise of that market power demonstrates the existence of a relevant economic market for the pricing of Amex services to merchants – a one-sided market.

VI. INCREASED AMEX OR CREDIT CARD OUTPUT DOES NOT DEMONSTRATE THE ABSENCE OF ANTICOMPETITIVE IMPACT

The Court of Appeals suggests that Amex might justify its Restraints by a showing that Amex's "output" – that is, the volume of Amex transactions – is increased because of the Restraints.[46] However, if the Amex Restraints have effects beyond the Amex platform, as is the case here, then the Amex output alone is not a proper indicator of the welfare effect of the Restraints. A relevant analogy is an exclusive dealing contract. An exclusive dealing vertical restraint may increase the "output" of the firm imposing this restraint, but at the expense of the firm's competitors and potential entrants – the alternatives whose use is affected by the Restraints. The proper measure of output would then be the size of the market served by all competitors.

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[45] The Court of Appeals asserts that "Cardholder insistence results not from market power, but instead from competitive benefits on the cardholder side of the platform and the concomitant competitive benefits to merchants who choose to accept Amex cards." Pet. App. 45a. Indeed, cardholder insistence is not the result of market power, rather market power is the result of insistence.

[46] Pet. App. 52a.

Here, the fundamental product at issue is "payment." If one desired to determine indirectly through "output" the pro- or anti-competitive nature of a credit card platform's vertical price restraints, the proper metric would be the output of all payment methods that are impacted by the Amex Restraints. The effect of the restraints is to increase the subsidization of the users of credit card platforms by customers paying by other means. With increased cardholder benefits resulting from competition on the cardholder side in the face of high credit card merchant fees, customers will be motivated to switch from other payment forms to credit cards. Thus, the usage of credit cards may increase. But this is only evidence of distortion in the competitive process, not evidence that the restraints are procompetitive.[47] For those customers switching to credit cards only because of increased rewards, credit card use can be presumed less efficient than the prior preferred means of payment. As a consequence of the use of less efficient means of payment, the cost of transacting will increase, and the output of all payment means affected by the Amex Restraints – the proper measure of output in this context – will be expected to decline.

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[47] *See, e.g.*, Adan J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1356 (2008) ("[B]y making credit cards appear relatively cheaper to other payment systems, merchant restraints encourage higher usage of credit cards than would otherwise occur.").

CONCLUSION

Based on the foregoing analyses, the amici respectively ask the Court to reverse Second Circuit's decision.

Respectfully submitted,

ANTHONY J. BOLOGNESE
Counsel of Record
BOLOGNESE & ASSOCIATES, LLC
1500 JFK Boulevard, Suite 320
Philadelphia, PA 19102
(215) 814-6750
ABolognese@Bolognese-Law.com

Counsel for Amici Curiae

Dated: December 14, 2017

APPENDIX

APPENDIX

Amicus **John M. Connor** is a Professor of Industrial Economics emeritus at Purdue University. Professor Connor specializes in research and teaching of empirical industrial economics and antitrust policy. His research has been cited in five court decisions and more than 75 law review articles. Professor Connor is also Senior Advisor to the American Antitrust Institute.[1]

Amicus **Martin Gaynor** is a Professor of Economics and the E.J. Barone Chair in Health Systems Management at Carnegie Mellon University. Professor Gaynor has consulted for the Federal Trade Commission and the U.S. Department of Justice, and also consulted for the Netherlands Competition Authority on issues involving vertical restraints and market definition.[2]

Amicus **Daniel McFadden** is a Nobel Laureate in economics (2000) and the E. Morris Cox Professor Emeritus of Economics and the Director of the Econometrics Laboratory at the University of California at Berkeley. Among his many honors, Professor McFadden received the John Bates Clark Medal from the American Economics Association (1975) and the Frisch Medal from the Econometrics Society (2000).[3]

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1 Purdue University, John M. Connor, https://goo.gl/ZaQdzU

2 Martin Gaynor Curriculum Vitae, http://bit.ly/2fFTvQO

3 University of California at Berkeley, Faculty Profiles, McFadden, http://bit.ly/2eoJMk9

Amicus **Roger Noll** is Professor of Economics emeritus at Stanford University and a Senior Fellow and member of the Advisory Board at the American Antitrust Institute. Before coming to Stanford, Professor Noll was a Senior Economist at the President's Council of Economic Advisers, a Senior Fellow at the Brookings Institution, and Institute Professor of Social Science and Chair of the Division of Humanities and Social Sciences at the California Institute of Technology.[4]

Amicus **Jeffrey M. Perloff** is a Professor in the Department of Agricultural and Resource Economics at the University of California at Berkeley. Professor Perloff has authored textbooks on economics including Modern Industrial Organization (with Dennis Carlton), Microeconomics, Microeconomics: Theory and Applications with Calculus, and Estimating Market Power and Strategies (with Larry Karp and Amos Golan).[5]

Amicus **Joseph A. Stiglitz** is a Nobel Laureate in economics (2001) and is University Professor at Columbia University. He is a former senior vice president and chief economist of the World Bank and a former member and chairman of the U.S. President's Council of Economic Advisors. Based on academic citations, Professor Stiglitz is the fourth-most influential economist m the world today.[6]

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[4] Stanford University Public Policy Program, Roger Noll http://stanford.io/2fFUOiP

[5] University of California at Berkeley Department of Agricultural and Resource Economics, Jeffrey M. Perloff Brief Bio, http://bit.ly/2emKIWc

[6] Columbia University, Brief Biography of Joseph E. Stiglitz, https://goo.gl/e6tCkb

Professor Stiglitz is currently consulting and is an expert witness for a number of national supermarket and drugstore chains that have challenged Amex's, Visa's, and MasterCard's restraints in related lawsuits pending in the District Court.[7]

Amicus **Lawrence J. White** is Robert Kavesh Professor of Economics and Deputy Chair of the Economics Department at New York University's Leonard N. Stern School of Business. He has served on the Senior Staff of the President's Council of Economic Advisers, and has also served as the Director of the Economic Policy Office in the Antitrust Division of the U.S. Department of Justice. Professor White is also the General Editor of the Review of Industrial Organization, a journal that focuses on competition and monopoly in their many forms and their effects on efficiency, innovation, and social conditions.[8]

Amicus **Ralph Winter** holds the Canada Research Chair in Business Economics and Policy at the Sauder School of Business at the University of British Columbia. [9] He was previously a Professor of Economics at the University of Toronto, and has also

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[7] Those merchants are: Ahold U.S.A., Inc.; Albertson's, Inc.; BI-LO, LLC; CVS Health, Inc.; The Great Atlantic & Pacific Tea Company, Inc.; H.E. Butt Grocery Co.; Hy-Vee, Inc.; The Kroger Co.; Meijer, Inc.; Publix Super Markets, Inc.; Raleys Inc.; Rite Aid HDQTRS Corp.; Safeway Inc.; Supervalu, Inc.; and Walgreen Co.

[8] New York University Stern School of Business, Lawrence J. White Biographical Summary, https://goo.gl/zCwff1

[9] University of British Columbia Sauder School of Business, Ralph Winter, https://goo.gl/ennG6B

served as President of the Canadian Economics Association. Professor Winter has also consulted for the U.S. Department of Justice and the Canadian Competition Bureau.[10]

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[10] University of British Columbia Sauder School of Business, Ralph Winter Curriculum Vitae, http://bit.ly/2fPyrG9

No. 16-1454

In the Supreme Court of the United States

STATE OF OHIO, ET AL.,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR DISCOVER FINANCIAL SERVICES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ELIZABETH P. PAPEZ*
ANDREW C. NICHOLS
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000
epapez@winston.com
**Counsel of Record*

Counsel for Amicus Curiae

QUESTION PRESENTED

This case asks how Section 1 of the Sherman Act, which bans unreasonable restraints of trade, applies to "two-sided" platforms that unite distinct customer groups. Such platforms are ubiquitous, ranging from eBay (serving buyers and sellers), to newspapers (serving readers and advertisers). Here, credit-card networks bring cardholder customers together with merchant customers for ordinary transactions. When doing so, Respondents American Express Company and American Express Travel Related Services Company ("Amex") contractually bar merchant customers from steering cardholder customers to credit cards that charge merchants lower prices. Applying the "rule of reason," the district court held that: (1) the Government proved that Amex's anti-steering provisions were anticompetitive because they stifled competition among credit-card companies for the prices charged to merchants, and (2) Amex failed to establish any procompetitive benefits. The Second Circuit reversed. It held that, to prove that the anti-steering provisions were anticompetitive (and so to transfer the burden of establishing procompetitive benefits to Amex), the Government bore the burden to show not just that the provisions had anticompetitive pricing effects on the merchant side, but also that those anticompetitive effects outweighed any benefits on the cardholder side. The question presented is:

Under the "rule of reason," did the Government's showing that Amex's anti-steering provisions stifled price competition on the merchant side of the credit-card platform suffice to prove anticompetitive effects and thereby shift to Amex the burden of establishing any procompetitive benefits from the provisions?

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INTEREST OF *AMICUS CURIAE*[*]

Discover Financial Services operates the Discover payment network and, along with certain affiliates and third parties, issues Discover-branded payment cards to consumers. As detailed in the district court's opinion, *e.g.*, Pet. App. 70a-86a, Discover competes directly with Respondents American Express Company and American Express Travel Related Services (collectively, "Amex") on both sides of the "two-sided" (merchant-cardholder) payment platform described in the decisions below. Pet. App. 39a-40a. Discover competes with Amex, Visa, and MasterCard in selling network services to merchants and acquiring banks. Pet. App. 70a, 117a. And Discover competes with Amex and numerous Visa- and MasterCard-affiliated banks in issuing payment cards to cardholders. *Ibid.*

Discover has a direct interest in this action because the opinion below reinstates Amex network rules—known as "nondiscriminatory provisions" ("NDPs") or "anti-steering rules"—that bar merchants from steering transactions to Discover or other payment card networks that offer merchants lower transaction fees. *E.g.*, Pet. App. 100a-101a, 203a-207a. Discover's unrebutted trial testimony that the NDPs thwarted Discover's attempt to compete for merchant business on the basis of price was central to the district court's conclusion that the NDPs violated Section 1 of the Sherman Act. Pet. App. 197a, 203a-205a. As Petitioners and the United States explain

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[*] Pursuant to Rule 37.3(a), Discover has received consent for its filing from all parties. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity other than Discover has made a monetary contribution to the preparation or submission of this brief.

in their briefs, Discover's experience "vividly illustrates" how the NDPs "block[] price competition" and stifle "innovat[ion]" in payment systems. Brief for the United States as Respondent Supporting Petitioners at 32 ("U.S. Br.") (citing Pet. App. 203a)); Brief for Petitioners ("Pet. Br.") at 46.

The opinion below does not contest these findings. It reinstates the NDPs on the basis that the "District Court's erroneous market definition caused its anticompetitive effects finding to come up short." Pet. App. 49a. The opinion below begins by emphasizing that "cardholders and merchants * * * comprise distinct yet equally important and interdependent sets of consumers sitting on either side of the payment-card platform." Pet. App. 50a. It then holds that the district court "erred" in "declin[ing] to * * * collaps[e] the [cardholder] issuance and [merchant] network services markets into a single platform-wide market for transactions" on payment card networks. Pet. App. 32a (internal quotation marks omitted). Adopting this new market definition, the court of appeals held that the NDPs' undisputed interference with network price competition for merchant business did not satisfy Plaintiffs' "initial burden" of showing "an actual adverse effect on competition as a whole in the relevant market," Pet. App. 49a-50a (internal quotation marks omitted), because it did not "show that the NDPs made all Amex consumers on both sides of the platform—*i.e.*, both merchants and cardholders—worse off overall." Pet. App. 51a.

Discover has an obvious interest in this Court's review of the legal analysis the court of appeals employed to disregard the NDPs' admitted interference with Discover's attempt at price competition. See Pet. App. 197a, 206a; U.S. Br. 32-24. Discover also

has a direct interest in the economically sound and predictable application of antitrust law to the distinct but related markets and competitive processes involved in the successful operation of payment networks. As the court of appeals observed, Discover operates the same type of "two-sided" credit and charge-card platform that Amex does, Pet. App. 23a, and provides network services to "separate, yet deeply interrelated, markets" on either side of this platform, *ibid* (internal quotation marks omitted). Accordingly, Discover is acutely aware of the need to "balance the two sides of its platform" by, among other things, pricing its services to "reflect the unique demands of the consumers on each side." Pet. App. 9a.

This Court's approach to the market definition and burden-shifting issues in this case could significantly affect this competitive balancing process in many different contexts. Accordingly, Discover respectfully submits this brief in the hope that it will aid the Court in resolving the question presented in accordance with business and market realities relevant to advancing the "primary" antitrust aim of "protect[ing] interbrand competition" within and across payment networks. *State Oil Co.* v. *Khan*, 522 U.S. 3, 15 (1997).

STATEMENT

The history of the NDPs (or "anti-steering" rules) at issue in this case is addressed in the government briefs. See Pet. Br. 6-9; U.S. Br. 5-7. In general, these rules "bar[] merchants from (1) offering customers any discounts or nonmonetary incentives to use credit cards less costly for merchants to accept, (2) expressing preferences for any card, or (3) disclosing information about the costs of different cards to merchants who accept them." Pet. App. 4a. This en-

forcement action was originally brought against Visa and MasterCard anti-steering rules as well as the Amex NDPs addressed below. Pet. App. 66a. But Visa and MasterCard resolved the claims against them in a 2012 consent decree, so the case proceeded to trial only on the Amex rules. Pet. App. 66a-67a.

Discover—the smallest major payment network by charge volume and only successful new network entrant in decades, Pet. App. 151a, 154a—testified as a government witness about the NDPs' competitive effects, Pet. App. 154a, 203a-207a, 212a-214a, 219a-220a, notably in thwarting Discover's strategy to gain market share "by pricing its network services 'very aggressively for merchants,'" Pet. App. 203a (quoting Tr. 821:8–16[1]).

A. Discover Offers Breakthrough Value Propositions to Cardholders and Merchants

"Discover was initially owned and operated by one of the nation's largest retailers, Sears, which marketed Discover's cards to its already significant population of private label cardholders." Pet. App. 154a n.24. Leveraging this initial platform, Discover was able to gain a foothold in the broader payment card industry by offering "breakthrough value propositions" to both cardholders and merchants. *Id.* at 203a. The value proposition on the cardholder side was that, "in 1986, most credit cards had annual fees," but "Discover had no annual fees," offered "24 by 7 customer experience," and "was the first card to

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[1] Unless otherwise indicated, all transcript references in this brief are to the trial testimony of Discover's President, Roger Hochschild.

have any form of rewards with providing cash back on every transaction." Tr. 821:9-13. Discover complemented these cardholder incentives with a value proposition to merchants. Discover "pric[ed] its network services 'very aggressively for merchants[,] setting all-in discount rates significantly below those of its competitors." Pet. App. 203a-204a (quoting *id.* at 821:14). Discover was able to do this through a "very focused effort on keeping [its] expenses as low as possible." Tr. 821:24-25. "[B]y operating very efficiently" in a market in which other networks were "charging a lot to merchants and charging a lot to cardholders," *id.* at 821:22-25, Discover could offer "a good value proposition to [its] merchant customers on one side and a good proposition to [its] cardholders on the other side," *id.* at 822:1-3.

B. Discover Attempts to Compete By Offering Merchants Lower Prices

Although Discover is accepted at over nine million merchant locations (roughly the same number as Visa and MasterCard and more than Amex), see Pet. App. 184a-185a, Discover's network has by far the smallest share of U.S. credit and charge card volume. See Pet. App. 151a (estimating 2013 shares of total charge volume at Visa 45%, Amex 26.4%, MasterCard 23.3% and Discover 5.3%). As Discover explained at trial, it also trails rivals in certain categories of card issuance, as well as in volume of loan amounts outstanding. See Tr. 816:24-817:1.

The evidence in the trial record identifies the battle for share of charge volume in the market for network services to merchants, as well as the battle for share of consumer spending or loans in the market for branded card-issuance to consumers, as the focal

points of horizontal competition among payment card networks and the banks that issue network-branded credit and charge cards. See Tr. 814:14-16 (Discover "competes against Visa, MasterCard and American Express" in the provision of network services to merchants and banks, and "measures its market share as a credit card network in terms of percent of total sales volume for general purpose credit cards"); Tr. 816:5-18 (Discover also competes with Amex and "well over a hundred banks" in issuing credit cards to consumers and measures its share of that market based on "two metrics * * * share of credit card loans outstanding * * * and share of credit card sales"); J.A. 129-30 (Visa document stating that "every share point that is shifted in the market to the bankcards' advantage -- to the advantage of Visa and MasterCard -- shifts almost $80 million in pre-tax profit away from American Express"); *id.* at 190 (Amex presentation stating that "the only real way to prove that our customers prefer us is to measure market share" in each of the various "business[s]" Amex serves).

Networks can "increase consumer preference for using" their brand and affiliated services, J.A. at 129, by competing on either or both "sides" (merchant or cardholder) of the "two-sided" platform described in the opinions below. Merchants and cardholders are "distinct yet interrelated" groups of consumers who purchase "distinct yet interrelated" products from payment card networks. Pet. App. 117a-119a; Tr. 814-816. This "interrelatedness"—which gives rise to the so-called "chicken and egg problem" of merchant acceptance turning on cardholder acceptance and vice-versa, Tr. 821:4—means that a network can improve its competitive position across the entire pay-

ment platform by competing for market share in the product markets on either side of it. Tr. 828-831.

"Sensing an increase in merchant dissatisfaction in the late 1990s amidst a series of price increases by its competitors, Discover saw an opportunity to leverage its position as the lowest-priced network to gain share." Pet. App. 204a (citations omitted). Accordingly, in "1999, the network launched a 'major campaign' aimed at highlighting the pricing disparity between it and its competitors in order to persuade merchants to 'shift their business to [Discover's] lower-priced network.'" *Ibid.* (quoting Tr. 833:4–11). As Discover's then-President explained: "Discover intend[s] to partner with merchants in helping them control payment costs and propose[s] that they steer customers to the lower-cost Discover cards." Pet. App. 204a (citing Tr. 834:13–20; PX1277 at '090, '094–95 (noting that Discover wanted "to help [merchants] save money by encouraging their customers to pay with Discover Card").)

To kickstart the campaign, Discover "sent a letter to every merchant on its network, alerting them to [its] competitors' recent price increases and inviting the merchant to save money by shifting volume to Discover." Pet. App. 204a (citing Tr. 836:6–837:18). Discover also "met with a number of larger merchants to offer discounts from the network's already lower prices if they would steer customers to Discover." *Ibid.* In these meetings Discover "suggested a number of means by which merchants could achieve this share shift, including point-of-sale signage," Pet. App. 204a-205a (citing Tr. 839:22–842:3; PX1292 at '991–94), and the use of pass-through pricing that would convert the network fee reductions into lower retail prices that generate customer loyalty to mer-

chants, Pet. App. 205a (citing Tr. 847:8–848:14).) Discover believed that over the long term, this strategy and "offering further discounts to large merchants would be profitable for the network" because it would generate "greater transaction volume, and resulting increases in discount and interest revenue." Pet. App. 205a (citing Tr. 837:19-25).

The district court found that Discover's merchant discount campaign was a paradigmatic example of horizontal price competition that would have influenced consumer behavior in an unrestrained market. Discover testified that it was willing to "sacrifice some revenue per transaction" in order to "grow[] the number of transactions and get[] other revenues on those transactions." Tr. 837:21-24. And several "merchants testified that they would, in fact, steer if given the opportunity." Pet. App. 222a (citations omitted). But Discover's efforts at price competition "failed to produce 'any significant movement in share' due to the anti-steering rules maintained at the time by Visa, MasterCard, and American Express." Pet. App. 205a (quoting Tr. 848:15–849:15).

Several merchants advised Discover that they could not "express a preference for Discover" or otherwise "steer share to Discover's lower-priced network" without violating the anti-steering rules "imposed by the other payment networks." (Pet. App. 205a (citing Tr. 848:15–849:15, 852:24–853:15).[2] As

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[2] For example, the record contains unrefuted evidence that the NDPs preclude merchants from:

- "[o]ffering a 10% discount off the posted purchase price, free shipping, free checked bags, gift cards, or any other monetary incentive for using their Discover card";
- "[p]osting a sign saying 'We Prefer Discover' at the point

the district court observed, merchant "steering" is in other industries "both procompetitive and ubiquitous"—indeed as "routine[]" as "placing a particular brand of cereal at eye level." Pet. App. 67a. But it is "absent in the credit card industry because the NDPs eliminate merchants' ability to "attempt to influence customers' purchasing decisions" in favor of a particular network's lower-priced services. *Ibid.*; see also *id.* at 204a-205a.

In the face of this competitive restraint, Discover "abandoned" its low-price campaign because giving merchants a "'discount without getting anything in return didn't make business sense'" for Discover. Pet. App. 206a (quoting Tr. 854:7-15) ("'To the extent that offering a lower price was not going to give [Discover] any business benefits, it was leaving money on the table'" that it could channel into other competitive endeavors.). Accordingly, Discover refocused its strategy on closing the "[c]ompetitive [g]ap" with rivals by "raising [its] discount rates" to "more closely align" with Visa and MasterCard. *Ibid.*

C. The District Court Finds the NDPs Unreasonably Restrain Trade

After a seven-week bench trial, the district court issued a 150-page opinion holding that Amex's NDPs unreasonably restrained trade in violation of the Sherman Act. Pet. App. 69a-71a, 112a, 114-122a, 259a. Applying this Court's precedents on market

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of sale"; and

- "[a]nswering the phone by saying 'Thank you for calling us, we proudly accept the Discover card' or posting a sign that says 'Thank You For Using Discover.'"

Pet. App. 100a-101a.

definition and the "three-step burden shifting framework" that governs "rule of reason" review,[3] see Pet. App. 108a, 111a-112 (citing *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956); *Eastman Kodak Co.* v. *Image Tech. Svcs., Inc.*, 504 U.S. 451, 482 (1992); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 336 (1962)), the district court weighed all the trial evidence and found that the NDPs unreasonably restrained trade because they "block[ed]" inter-network price competition, "stifle[d]" innovation, and resulted in higher costs for both "merchants and cardholders." Pet. App. 193a, 203a-222a (finding that "inflated merchant discount rates are passed on to all customers—Amex cardholders and non-cardholders alike—in the form of higher retail prices").

1. In defining the product market relevant to its analysis, the district court recognized that a "payment-card network sits at the center of a two-sided platform that 'comprises at least two separate, yet deeply interrelated, markets: a market for card issuance, in which Amex and Discover compete with thousands of Visa- and MasterCard-issuing banks; and a network services market, in which Visa, MasterCard, Amex, and Discover compete to sell ac-

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[3] The first step of this framework required the government plaintiffs to establish that the NDPs were "*prima facie* anticompetitive." *Cal. Dental Ass'n* v. *F.T.C.*, 526 U.S. 756, 771 (1999). Because the district court found that the government made such a showing, the burden shifted to Amex to identify any "procompetitive justification[s]" for the challenged rules. *Ibid.*; see Pet. App. 110a. And because Amex did so, the third step of the inquiry shifted the burden back to the government to show that the competitive benefits "could have been achieved through less restrictive means." Pet. App. 110a (citation omitted).

ceptance services" to merchants and their affiliates. Pet. App. 23a (quoting Pet. App. 70a). The NDPs, however, reside only in contracts governing the provision of network services to merchants. Pet. App. 19a, 95a. And the record contains no evidence that such services are interchangeable with the services that networks provide to issuers and their cardholders. Accordingly, and "[d]espite the two-sided nature of the platform" that comprises Amex's overall payment network, Pet. App. 23a, the district court concluded that the "relevant product market for purposes of its analysis of Amex's NDPs is the market for general purpose credit and charge card network services" to merchants. Pet. App. 121a.

In reaching this conclusion the district court expressly recognized the relationship between the market for network services to merchants and the market for network services to issuing banks and their cardholders. See Pet. App. 121a. The district court's analysis simply tracks record evidence of the services the NDPs contractually restrain—network services governed by "merchant agreements," Pet. App. 22a, 95a—in identifying the primary product market relevant to its analysis of the NDPs' competitive effects. It then defines the boundaries of that market in keeping with this Court's direction that antitrust product markets should generally encompass only "'products that have reasonable interchangeability" and "cross-elasticity of demand between the product itself and substitutes for it." *E.I. du Pont*, 351 U.S. at 404; see also *Brown Shoe*, 370 U.S. at 325; see Pet. App. 111a-112a.

This analysis did not foreclose consideration of Amex's arguments about the NDPs' competitive impact on the market for cardholder services. Pet. App.

71a, 121a-122a. It merely recognized the "reality," Pet. App. 118a, that the services Amex provides to merchants and cardholders are *not* interchangeable within the meaning of this Court's market-definition precedents, and thus deferred to the latter stages of its rule-of-reason analysis full consideration of the NDPs' competitive effects on markets beyond the one for the merchant services the NDPs contractually restrain. See Pet. App. 22a, 71a, 239a-240a.

2. Applying the first step of the rule-of-reason analysis, the district court concluded that the government had met its initial burden of showing that the NDP's were *prima facie* anticompetitive because, among other things, unrefuted trial evidence established that the rules actually and adversely affected competition by "effectively deny[ing]" other networks the ability to "offer[] merchants a low price in return for greater volume." Pet. App. 203a.

Like its analysis of market definition, the district court's analysis of the government's *prima facie* case did not foreclose consideration of the NDPs' proffered procompetitive effects in the market for network services to issuers and their cardholders, or of the NDPs' role in mediating network competition across the "two-sided" payment platform Amex operates. It simply shifted the burden to Amex to address procompetitive justifications for the NDPs, including and specifically the justification that the "NDPs enhance overall competition in the credit and charge card industry * * * by inhibiting competition in the network services market for merchants—thereby ensuring that Amex's spend-centric model continues to be fueled by high merchant discount fees—in favor of greater competition in the interrelated but distinct issuing market." Pet. App. 238a-239a.

Weighing all the evidence, the district court found that the NDPs' admitted restraint on network price competition for merchant business was not justified by the foregoing or other purported benefits to issuers, their cardholders, or overall platform competition. Pet. App. 71a, 229a, 239a-240a; see also *id.* at 228a-258a. Notably, the district court found that Amex's NDPs actually precluded other networks (and specifically Discover) from reaping a "competitive reward for offering merchants lower swipe fees" and "thereby *suppress[ed] an important avenue of horizontal interbrand competition*." *E.g.*, Pet. App. 197a (internal quotation marks and citations omitted; emphasis added). Based on this and other evidence, the district court found that "the failure of Discover's low-price value proposition is emblematic of the harm done to the *competitive process* by Amex's rules against merchant steering," Pet. App. 206a (emphasis added), and that this harm resulted in "higher prices for merchants *and* their customers," Pet. App. 228a. Accordingly, the district court concluded that the NDPs unreasonably restrained trade in violation of the Sherman Act and enjoined their enforcement. Pet. App. 71a, 2 59a.

D. The Court of Appeals Reinstates the NDPs

The court of appeals reversed and reinstated the NDPs on the grounds that the district court's erroneous "definition of the relevant market in this case is fatal to its conclusion that Amex violated § 1." Pet. App. 31a. According to the panel, the district court "erred in excluding the market for cardholders from its relevant market definition," and specifically in "'declin[ing] to * * * collaps[e] the issuance and network services markets into a single platform-wide

market for [payment card] transactions.'" Pet. App. 32a.

Applying this new market definition, *id.* at 32a-40a, the court of appeals held that even direct evidence that the NDPs "blocked" network price competition for merchant business was insufficient to meet the government's initial burden of showing that the NDPs are *prima facie* anticompetitive. See Pet. App. 31a, 39a-40a, 49a-53a. The reason, the panel stated, is that even this undisputed evidence did not prove "*net*" anticompetitive effects across both "sides" (merchant and cardholder) of Amex's "two-sided platform." Pet. App. 49a, 51-53a.

In reaching this conclusion, the court of appeals did not contest Discover's trial testimony or purport to disturb the district court's finding that the NDPs "block Amex-accepting merchants from encouraging their customers to use any * * * card other than an American Express card, even where that card is less expensive for the merchant." Pet. App. 100a-101a. It simply redefined the "relevant market" to include network services to cardholders because such services are "necessarily affected" by (though not interchangeable with) network services to merchants, and then disregarded the NDPs' restraint on competition for the latter as inadequate to show that the "NDPs made all Amex consumers on both sides of the platform—i.e., both merchants and cardholders—worse off overall." Pet. App. 51a; see also *id.* at 39a-54a.

The court of appeals' market definition and ensuing assessment of the government's *prima facie* case depart from this Court's precedents because the record contains no evidence that network services to merchants are interchangeable with, or in any sense

substitutes for, network services to cardholders. The opinion below grounds this departure in competition policy concerns purportedly unique to "two-sided" platforms and the particulars of Amex's business model. See Pet. App. 49a-53a. Specifically, the court of appeals reasoned that because the "NDPs simultaneously affect competition for merchants and cardholders by protecting the critically important revenue that Amex receives from its relatively high merchant fees," a "reduction in revenue that Amex earns from merchant fees may decrease the optimal level of cardholder benefits, which in turn may reduce the intensity of competition among payment-card networks on the cardholder side of the market." Pet. App. 50a. The court of appeals then held that the government's failure to rebut this potential competitive benefit in its *prima facie* case—and specifically its failure to identify a "net price affecting consumers on both sides of the platform"—required reversal of the district court's judgment and reinstatement of the NDPs. Pet. App. 53a-54a.

SUMMARY OF ARGUMENT

"[T]he primary purpose of the antitrust laws is to protect interbrand competition." *State Oil*, 522 U.S. at 15 (citation omitted). To compete for market share against other brands, a payment card network must "balance the two sides of its platform" by, among other things, pricing its services to "reflect the unique demands of the consumers on each side." Pet. App. 9a. Such balancing must be responsive to market forces on all sides of the platform, because competition at the platform level depends on the competitiveness of each network's offerings in each product market the platform serves. This phenomenon is not unique to payment-card platforms. It applies equally

to any platform (a newspaper serving advertisers and readers, or a travel booking business serving hotels and guests) in which platform-level competition turns on rivals' ability to offer a dynamic range of "different price pairs" to the markets the platform serves in the hope of finding one that "best satisf[ies] consumer preferences." Economists' Cert. Amicus Br. 11.

Amex successfully competes with other networks by offering the price pair described in the opinions below. *E.g.*, Pet. App. 50a. The problem with the NDPs is that they protect Amex's competitive model by restraining other networks from using their own price pairs to compete freely with Amex.

The antitrust laws dictate that "*competition* should choose the optimal mix of revenue between the two sides" of the platform. Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶562(e), at 101 (Supp. 2017) (Areeda & Hovenkamp). Accordingly, in this case as in others, the central aim of the antitrust laws is best served by adhering to this Court's precedents respecting the economic boundaries of product markets, and allowing sufficient evidence of anticompetitive effects in any such market—including those that are part of a broader network or platform—to trigger antitrust scrutiny under the burden-shifting framework this Court has long applied to rule-of-reason analysis. Any other approach—and particularly one that excuses direct and undisputed evidence of anticompetitive restraints in one or more product markets comprising a network platform—will inhibit competition both within and across the platform precisely because the product markets it serves are related.

The opinion below disregards these principles in order to protect Amex's chosen method of competing with MasterCard and Visa over competition more broadly. The record here provides no reason to endorse this approach, and many reasons to reject it.

1. The court of appeals' departure from this Court's longstanding definition of an antitrust product market is not supported by the law or record, and is not necessary to protect competition among operators of "two-sided" payment card networks. Although the markets for network services to merchants and cardholders are related, the record shows—and Amex concedes, Br. in Opp. 16—that a network cannot "substitute" its competitive offerings to one group with its competitive offerings to the other. In such circumstances, this Court's precedents counsel that the threshold question whether a challenged practice—here, a contractual restraint that networks impose on *merchants*—has "anticompetitive effects" is properly assessed in the market for the restrained service and its substitutes.

This Court's precedents further counsel that where, as here, there is direct evidence that a challenged practice restrains horizontal price competition in the market for a particular service and its reasonable substitutes, a district court may rely on it to find anticompetitive effects necessary to satisfy the first step of the rule-of-reason analysis and shift the burden to the defendant to address any procompetitive justifications for the restraint. That is because on such a record, a district court may fairly conclude that questions about how the challenged practice "affect" competition in "related" but distinct product markets are properly addressed to the reasonableness—not the existence—of the practice's anticompet-

itive effects.

There was no need to alter or dispense with the foregoing approach in this case merely because the NDPs restrain competition in a service market that sits on one side of a "two-sided" platform. Indeed, market definition is particularly important where a challenged practice applies only to customers in one of several distinct product markets served by a broader platform (here, NDPs in merchant but not cardholder contracts), because an overbroad market definition will short-circuit the antitrust inquiry and excuse at the outset practices that undeniably restrain competition in product markets that must be competitive in their own right to foster free and fair competition across the platform.

Discover's trial testimony again illustrates the point. In an effort to compete with Visa, MasterCard and Amex both within and across the network platform at issue here, Discover attempted to engage in price competition for merchant business that the NDPs admittedly "block[ed]." Pet. App. 100a. But the court of appeals' unprecedented approach to market definition caused the court to disregard this competitive restraint as legally irrelevant. Pet. App. 49a-53a. In so doing, the court of appeals immunized from antitrust scrutiny a conceded restraint not just on network competition for merchant business, but also—because that market is part of a broader platform—on the competitive pairings networks can offer across the platform.

2. The danger inherent in the court of appeals' market definition is evident in the court's articulation of the proof required to establish that the NDPs are "*prima facie* anticompetitive." *Cal. Dental Ass'n* v.

FTC, 526 U.S. 756, 771 (1999); Pet. App. 32a, 39a-40a, 49a-53a. The court of appeals held that undisputed evidence of price restraints this Court has long recognized as sufficient to satisfy step one of the rule-of-reason analysis did not suffice here, Pet. App. 205a-207a, 227a-228a, because the "two-sided" nature of Amex's network "platform" required *prima facie* evidence that the "NDPs made *all* Amex consumers on both sides of the platform—*i.e.*, both merchants and cardholders—worse off overall." *Ibid.*

This Court should reject that approach and advance the "primary" antitrust aim of "protect[ing] interbrand competition," *State Oil*, 522 U.S. at 15, by reaffirming the application of settled antitrust principles to the district court's undisturbed factual findings. Applying those principles, the district court correctly began its analysis of the challenged practice here (Amex's NDPs) by identifying the service market they contractually restrain (network services to merchants), and then defining the boundaries of that market based on the economic substitution test in this Court's precedents. The district court then correctly focused on proof of anticompetitive effects within that market to determine whether the NDPs were *prima facie* anticompetitive for purposes of step one of the rule-of-reason analysis.

The record evidence that the NDPs restrain price competition in a core product market served by Amex's platform was under this Court's precedents sufficient to support the district court's finding that the NDPs were *prima facie* anticompetitive, and to shift the burden to Amex to identify any procompetitive justifications for them.

3. The district court's adherence to this settled

burden shifting approach on the record here did not condemn the Amex business model the court of appeals sought to protect in the opinion below. It simply refused to protect it at the expense of restraining competition by Discover or other networks willing to offer different price or service combinations consumers might find more attractive. In short, the district court's analysis would allow "competition," not courts or particular competitors, to drive network price and service offerings both within and across the payment card platform at issue here. That is the right result, and the Court should reject the court of appeals' contrary analysis, which uses the "rule of reason" to do exactly what this Court has held it should not: namely, treat "competition itself [a]s unreasonable." *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 696 (1978).

ARGUMENT

I. The Opinion Below Unjustifiably Departs From This Court's Approach to Market Definition

Although the text of Section 1 of the Sherman Act prohibits "[e]very contract * * * in restraint of [interstate] trade or commerce," 15 U.S.C. § 1, this Court has long held that the statute "prohibit[s] only *unreasonable* restraints of trade." *E.g.*, *Nat'l Collegiate Athletic Ass'n* v. *Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 98 (1984) (*NCAA*) (emphasis added). Market definition is important in assessing whether a challenged practice "unreasonabl[y]" restrains competition, because the competitive impact of a challenged practice depends, among other things, on the availability of substitutes for the product or service it allegedly restrains.

Accordingly, this Court has long held that the "relevant market for antitrust purposes is determined by the choices available to" consumers of the restrained product or service, *e.g.*, *Kodak*, 504 U.S. at 481–482, and is therefore defined by "products that have reasonable interchangeability" with it. *Id.* at 482 (quoting *du Pont*, 351 U.S. at 404). Interchangeability requires similar products or services as well as similar customer needs and preferences that result in "cross-elasticity of demand between the product itself and substitutes for it." *E.I. du* Pont, 351 U.S. at 404; see also Pet. App. 111a-112a; *Brown Shoe*, 370 U.S. at 325.

The court of appeals purported to acknowledge this definition of a product market. Pet. App. 32a. But it abandoned it in defining the market in this case to include *any* product, service, or customer for which the "NDPs *affect* competition." Pet. App. 51a. The legal precedents the court cites, Pet. App. 32a, focus on product substitutes, not "affect[ed]" markets. See *id.* And the record contains no evidence that the services Amex provides to cardholders are in any way "substitutes" for the services Amex provides to merchants. *E.g.*, *Kodak*, 504 U.S. at 482. Indeed, the district court found exactly the opposite. See Pet. App. 114a-122a, 127a.

Lacking any relevant precedent for defining a product market to include services or products that are not interchangeable, the court of appeals simply asserted that its novel market definition was necessary to protect "critically important revenue" Amex needed to compete against Visa and MasterCard. Pet. App. 50a. But that is not enough under the antitrust laws, which protect "'competition, not competitors.'" *Atl. Richfield Co. v. USA Petroleum Co.*, 495

U.S. 328, 338 (1990). As Discover's experience illustrates, the court of appeals' market definition undermines both product-market and platform-level competition by excusing a clear impediment to price rivalry in the product market the NDPs directly restrain, and that must be competitive in order to foster competitive offerings across the platform.

1. As the district court correctly observed, the services that Amex and other networks provide to merchants and cardholders are part of a broader platform, but are nonetheless "distinct [and] involve[e] different sets of rivals and the sale of separate, though interrelated, products and services to separate groups of consumers." Pet. App. 119a.[4] The district court was thus fully justified in relying on record evidence that the NDPs appear only in contracts for network services to merchants to define the services they contractually restrain, and then defining the market for those services in keeping with the product substitution analysis in this Court's precedents in order to assess whether the NDPs had anticompetitive effects sufficient to satisfy the first step of the rule-of-reason inquiry. Pet. App. 119a-120a.

This Court's analysis in *Times–Picayune* illustrates the point. The plaintiff in that case challenged (as an anticompetitive tying arrangement) a newspa-

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[4] Similarly in *Brown Shoe Co.* v. *United States*, 370 U.S 294 (1962), this Court held that although all the defendants produced some form of shoes, "the record supports the district court's finding that the relevant lines of commerce are men's, women's, and children's shoes. These product lines are recognized by the public; each line is manufactured in separate plants; each has characteristics peculiar to itself rendering it generally noncompetitive with the others; and each is, of course, directed toward a distinct class of customers." *Id.* at 326.

per requirement that all advertisers who wished to run content in the paper's morning publication would also have to run content in the paper's (distinct but related) evening publication. *Times-Picayune Publ'g Co.* v. *United States*, 345 U.S. 594, 596-597 (1953). In assessing the product market relevant to its antitrust analysis of the challenged restraint, this Court recognized that "every newspaper is a dual trader in separate though interdependent markets" serving both advertisers and readers. *Id.* at 610. But because the restraint in issue "concern[ed] solely one of these markets" (because it applied only to advertisers, not readers), the Court defined the relevant market solely in terms of competition for advertisers. *Ibid.*

The record here is similar. See Pet. App. 119a-120a. Although "merchants and their customers jointly make the decision of which method of payment is used for any given transaction," Pet. App. 127a, the NDPs appear only in network contracts with merchants. Accordingly, the "'relevant consumer' for purposes of assessing price sensitivity" impacted by the NDPs "is the merchant," *ibid.*, and the network services market is the proper market for assessing whether the NDPs have anticompetitive effects sufficient to establish a *prima facie* case under step one of the rule of reason.

2. The court of appeals did not apply *Times-Picayune* (or *du Pont*, *Kodak*, or *Brown Shoe*), in defining the relevant market in this case. Pet. App. 118a. Nor did it explain how a network—much less a plaintiff—would go about calculating the "net price affecting consumers on both sides of the platform" it describes. Pet. App. 53a. That is not surprising, because as noted, its analysis sweeps in distinct and complex markets, customers, and services that are

not interchangeable, and are the subject of proposed innovations (like Discover's proposal to "offer[] merchants equity ownership in the network," Tr. 839:3-4), that would complicate any meaningful or reliable attempt to measure what the court of appeals termed a "net price." Pet. App. 53a. Accordingly, the court of appeals was left to defend its analysis as necessary to protect Amex's ability to compete against Visa and MasterCard. Pet. App. 48a-49a & n.51.

Again that is not a reason for insulating the NDPs from antitrust scrutiny, particularly by collapsing two distinct service markets with very different customers and competitive conditions, see Pet. App. 117a-119a; Tr. 814-16, into a sweeping "platform" market that will unnecessarily and intractably complicate the question whether a challenged practice is *prima facie* anticompetitive, and if so in what regard. The court of appeals identified no reason to introduce such uncertainty into the analysis on the record here, which concerns a contractual restraint that appears only in network agreements with merchants, and that supported the district court's initial assessment of the NDPs' competitive effects in the market for those services.

This traditional approach to market definition did not foreclose consideration of Amex's justifications for the rule. See Pet. App. 71a, 111a-122a. It simply left them to a later stage of rule-of-reason analysis. See *id.* at 71a, 239a-240a. In contrast, the court of appeals' unprecedented approach to market definition short-circuited antitrust review of the NDPs notwithstanding their admitted restraint on price competition in a product market the Sherman Act dictates must be open to competition in its own right.

II. The Court of Appeals' Market Definition Distorts the Rule-of-Reason Inquiry and Insulates an Admitted Restraint on Price Competition from Antitrust Scrutiny

The significance of the court of appeals' novel market definition is apparent from the court's description of the evidence required to establish a *prima facie* case that the NDPs had an anticompetitive effect in that market "as a whole." Pet. App. 49a-50a. The district court found on the record here that the NDPs' admitted restraint on horizontal price competition in the market for network services resulted in increased prices and reduced choice for *both* merchants *and* cardholders. *E.g.*, Pet. App. 39a-40a, 67a, 100a-101a, 203a-207a, 219a-220a. Yet the court of appeals held that even this extraordinary evidence was insufficient to establish a *prima facie* case that the NDPs had an anticompetitive in the "relevant market" because the evidence did not "show that the NDPs made all Amex consumers on both sides of the platform—*i.e.*, both merchants and cardholders—worse off overall." Pet. App. 51a.

This analysis is difficult to square with this Court's precedents condemning competitive restraints that "impede[] the ordinary give and take of the marketplace and substantially deprive[] customer[s]" of the chance "to utilize and compare prices." *Prof'l Eng'rs* , 435 U.S. at 692-93; *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 648-649 (1980) (holding that because credit terms "must be characterized as an inseparable part of price," restraining credit terms constituted an unlawful restraint on price competition under the Sherman Act). Because "price is the 'central nervous system' of the economy," *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150,

224-26 & n.59 (1940), price competition is "an object of special solicitude under the antitrust laws." *United States* v. *Gen. Motors Corp.*, 384 U.S. 127, 148 (1966); *NCAA*, 468 U.S. at 106 & n.30 ("[a] restraint that has the effect of reducing the importance of consumer preference in setting price" is inconsistent "with th[e] fundamental goal of antitrust law"). Accordingly, this Court's precedents support the district court's conclusion that the record evidence here was sufficient to establish a *prima facie* case that the NDPs unreasonably restrain trade, and thus to shift the burden to Amex to identify procompetitive justifications for the rules.

The court of appeals' contrary conclusion does not serve the purpose of the antitrust laws it purports to apply, because it preemptively terminates the antitrust analysis out of concern for procompetitive justifications that could be (and in the district court were) addressed in the second and third stages of the burden shifting analysis. See Pet. App. 239a-240a (finding that "even if * * * cross-market balancing is appropriate under the rule of reason in a two-sided context, here Defendants have failed to establish that the NDPs are reasonably necessary to robust competition on the cardholder side of the GPCC platform, or that any such gains offset the harm done in the network services market").

Given the district court's undisturbed findings on "cross-market balancing," see Pet. App. 239a-240a, this case does not require the Court to resolve precisely when or to what extent the "two-sided" nature of a payment network permits a defendant to justify an anticompetitive practice in one market by refer-

ence to its procompetitive effect in a related market.[5] Reversal is warranted under the settled principle that "unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress." *N. Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958).

Scrutinizing competitive restraints on either side of the "two-sided" platform the court of appeals described is critical to ensuring competition both within and across the platform. Yet that is precisely what the court of appeals' analysis precludes. There is no basis in the law or record for affirming this approach.

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[5] This Court has in some contexts discouraged such cross-market defenses on the ground that courts have an "inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector." *United States* v. *Topco Association, Inc.*, 405 U.S. 596, 609-10 (1972); cf. *United States* v. *Phila. Nat. Bank*, 374 U.S. 321, 370 (1963) ("If anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader."). That said, this Court has entertained such arguments in cases where the challenged practice impacts multiple related markets, see, e.g., *NCAA*, 468 U.S. at 117-19, and some lower courts have likewise recognized the need in some circumstances to "balance the anticompetitive effects on competition in one market with certain procompetitive benefits in other markets." *Sullivan* v. *NFL*, 34 F.3d 1091, 1112 52 (1st Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995).

III. The Decision Below Justifies Its Departure from Settled Antitrust Principles on Grounds That Violate the Sherman Act's Central Tenet

The court of appeals' departure from the law and record is particularly troubling because it is grounded in precisely the type of policy judgment the Sherman Act forbids. The court of appeals' decision turns on the conclusion that protecting Amex's "unique" method of competing with Visa and MasterCard, Pet. App. 87a, is more important than allowing Discover's low-price version or, for that matter, any inter-network price competition on merchant network fees at all. *Id.* at 39a-40a, 48a-53a. As noted, "the primary purpose of the antitrust laws is to protect interbrand competition." *State Oil*, 522 U.S. at 15. In upholding a "restraint that effectively blocks interbrand competition on price" because Amex could compete better without such price pressure, Pet. App. 235a, the panel opinion endorses exactly the "frontal assault on the basic policy of the Sherman Act" this Court has admonished against. *Prof'l Eng'rs*, 435 U.S. at 695; Pet. App. 235a, 240a-241a.

The antitrust laws do not authorize courts "to draw lines between 'good' competition and 'bad' competition," Pet. App. 201a, but rather "reflect a steadfast 'legislative judgment that ultimately [all forms of] competition will produce not only lower prices, but also better goods and services.'" *Ibid.* (quoting *F.T.C.* v. *Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990)). Any line-drawing among types of competition is a task reserved exclusively for Congress. See *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 611 (1972) ("If a decision is to be made to sacrifice competition in one portion of the economy for greater com-

petition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts."). And to date Congress's judgment has been to protect "'*competition*, not *competitors*.'" *Atl. Richfield*, 495 U.S. at 338 (quoting *Brown Shoe*, 370 U.S. at 320 and explaining that "[t]o hold that the antitrust laws protect competitors from the loss of profits due to [nonpredatory] price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share") (alteration in original) (citation omitted)).

The panel opinion disregards these fundamental principles in holding that the NDPs and Amex business model are more important than price competition, including the interbrand price competition the NDPs admittedly precluded Discover from successfully pursuing. Pet. App. 203a-207a, 219a. See *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 116-117 (1986) (describing the "perverse result" that would accompany a "hold[ing] that the antitrust laws protect competitors from the loss of profits due to * * * price competition"). As the district court's opinion illustrates, such a stark departure from this Court's precedents was not necessary to ensure proper consideration of the NDPs' impact on competition within and across the "two-sided" platform at issue here.

Based on the seven-week trial record, the district court found the failure of Discover's low-price campaign "emblematic of the harm done to the competitive process by Amex's rules against merchant steering." Pet. App. 206a. And it found that enjoining the NDPs would redress this harm by allowing Discover and other networks "aggressively [to] pursue a strategy of lowering [their merchant] prices" in exchange for volume while still robustly competing for card-

holders through rewards and steering benefits. Pet. App. 219a-220a.

On this record, the district court did not "err[]" in "declin[ing] 'to define the relevant product market to encompass the entire multi-sided platform.'" Pet. App. 39a (quoting Pet. App. 119a). It simply (and correctly) recognized that the merchant "side" of the platform constitutes a distinct product market under this Court's precedents, Pet. App. 114a-122a, and engaged in a rule-of-reason analysis that credited price restraints in this market as sufficient to establish a *prima facie* case before shifting the burden to Amex to identify procompetitive justifications that ultimately failed to carry the day. After weighing all the evidence, the court concluded that competition, rather than Amex's rules, should decide the "optimal mix of revenue as between the two sides." Areeda & Hovenkamp ¶562(e), at 101 (Supp. 2017). That is what the Sherman Act contemplates, and what the panel opinion disregards in conflict with the statute and this Court's decisions.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted.

ELIZABETH P. PAPEZ*
ANDREW C. NICHOLS
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000
epapez@winston.com

**Counsel of Record*

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IN THE

Supreme Court of the United States

STATE OF OHIO, *et al.*,

Petitioners,

—v.—

AMERICAN EXPRESS COMPANY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICI CURIAE* PROF. DAVID S. EVANS AND PROF. RICHARD SCHMALENSEE IN SUPPORT OF RESPONDENTS

ELAI KATZ
Counsel of Record
LANDIS C. BEST
HELENA S. FRANCESCHI
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, New York 10005
(212) 701-3000
ekatz@cahill.com

Attorneys for Amici Curiae Prof. David S. Evans and Prof. Richard Schmalensee

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INTEREST OF *AMICI CURIAE*[1]

Professors David S. Evans and Richard Schmalensee are economists who, individually and as co-authors, have published extensively on the economics of two-sided platform businesses and the application of antitrust analysis to them. Five of their publications on two-sided platforms, and the analysis of market definition for such enterprises, were cited in a total of seventeen references by the Second Circuit[2] and two of their publications were cited in a total of eight references by the District Court in the matter before the Court.[3] They submit this Amicus Brief to provide background and analysis that could assist the Court in applying the rule of reason to platform enterprises and to point out the serious risks of employing a rigid analytical framework for the antitrust analysis of diverse platforms, conduct, and fact patterns.

Evans and Schmalensee have been commissioned to write surveys concerning the antitrust economics of two-sided platforms for the American Bar Association (ABA) Antitrust Section's handbook, *Issues in Competition Law and Policy*, and for the

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1 No counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* and their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

2 *See* Pet. App. 7a, 8a, 10a-12a, 16a-18a.

3 *See id.* at 77a-79a, 122a, 131a, 182a n.36.

Oxford University Press, *Oxford Handbook of International Antitrust Economics*. They were also commissioned to write the entry on the general economics of two-sided platforms for the New Palgrave Dictionary of Economics. Their book, *Matchmakers: The New Economics of Multisided Platforms*, which provides a non-technical introduction to this area, won the 2017 Axiom Business Book Awards Gold Medal in Economics. It has been, or is in the process of being, translated into Chinese, French, Korean, Japanese, Russian, Spanish, and Vietnamese.

Professor David S. Evans is Chairman of Global Economics Group, based in Boston. He has been, since 2004, Visiting Professor at University College London where he is Co-Director of the Jevons Institute for Competition Law and Economics. He has also taught antitrust economics at the University of Chicago Law School (2006-2016) and antitrust economics and law and economics at Fordham Law School (1985-1995). He has authored or co-authored a number of articles on economic methods for defining markets and analyzing conduct involving two-sided platforms, as well as other topics in antitrust economics. He has been commissioned to write surveys on multisided platforms by the Antitrust Section of the ABA for its handbook *Market Definition in Antitrust: Theory and Case Studies* and by the Competition Committee of the Organisation for Economic Co-operation and Development (OECD) for its Policy Roundtable on Two-Sided Markets. He has worked, and is currently working, as an expert economist on antitrust matters involving platforms on behalf of defendants, plaintiffs, and competition authorities in the U.S.

and abroad. He has a Ph.D. in Economics from the University of Chicago.

Professor Richard Schmalensee is Dean Emeritus and Howard W. Johnson Professor of Management Emeritus at the Massachusetts Institute of Technology (MIT) Sloan School of Management and Professor of Economics Emeritus at the MIT Department of Economics. He is a Fellow of the Econometric Society and the American Academy of Arts and Sciences and has served as a Member of the President's Council of Economic Advisers and of the Executive Committee of the American Economic Association. He was the 2012 Distinguished Fellow of the Industrial Organization Society. He has authored or co-authored a number of articles on two-sided platforms and antitrust economics as well as numerous highly cited articles in industrial organization economics. He has worked as an expert economist on behalf of defendants, plaintiffs, and competition authorities on a wide variety of matters, some of which have involved platform enterprises. He has a Ph.D. in Economics from MIT.

SUMMARY OF ARGUMENT

The Court's analysis of competitive effects, which generally includes market definition as a critical step, has been guided properly by sensitivity to business reality and sound economic analysis of the conduct at issue. When it comes to two-sided platforms the Court should adhere to that same flexible but principled approach and avoid rigid alternatives that would apply regardless of the platform, conduct, or fact-pattern.

In the matter before the Court, the U.S. Department of Justice, as well as the Petitioner *Amici* Law Professors[4] and Petitioner *Amici* Economists[5] have proposed analytical frameworks that would, first, require courts to restrict the relevant antitrust market to the side of the platform that is the subject of the challenged conduct[6] and, second, to then exclude the impact of the conduct on the other side of the platform for the purposes of establishing anticompetitive effects under the first stage of the rule of reason inquiry.[7] This proposed analytical framework would apparently apply to all platform enterprises, for all possible challenged conduct, and for all possible fact

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[4] The "Petitioner *Amici* Law Professors" refers to the brief filed by the 28 Professors of Antitrust Law as *Amici Curiae* Supporting Petitioners (Dec. 14, 2017).

[5] The "Petitioner *Amici* Economists" refers to the brief filed by *Amici Curiae* John M. Connor, Martin Gaynor, Daniel McFadden, Roger Noll, Jeffrey M. Perloff, Joseph A. Stiglitz, Lawrence J. White, and Ralph A. Winter in Support of Petitioners (Dec. 14, 2017).

[6] *See* U.S. Br. 35-40; Petitioner *Amici* Law Professors' Br. 17-20; Petitioner *Amici* Economists' Br. 30-31.

[7] *See* U.S. Br. 43-47; Petitioner *Amici* Law Professors' Br. 20-27; Petitioner *Amici* Economists' Br. 30-31. The Petitioner *Amici* Law Professors and Petitioner *Amici* Economists would further exclude consideration of procompetitive benefits on the other side of the platform in the second stage of the rule of reason inquiry. *See* Petitioner *Amici* Law Professors' Br. 32-34; Petitioner *Amici* Economists' Br. 23. We note that the Justice Department does not go to this extreme. It argues that the courts should consider procompetitive benefits on the other side of the platform in the second stage of the rule of reason analysis. U.S. Br. 52.

patterns. Given that these platform enterprises are a large and growing portion of the economy, this framework would fundamentally transform the rule of reason.

Such a rigid approach could lead courts, and possibly require them, to ignore business reality, sound economics, and fact patterns in analyzing alleged anticompetitive conduct by platform enterprises and defining relevant antitrust markets. Following this approach could result in tribunals wrongly exonerating behavior that is anticompetitive (because, e.g., the harm to the other side is ignored) or wrongly condemning behavior that is not (because, e.g., the benefit to the other side is ignored).

The risk of error from ignoring customers on one side of a platform during the first stage of the rule of reason analysis is heightened for platforms that provide services that, by their very nature, are consumed jointly and unseverably by two different types of customers.[8] In these cases, the platform can charge either or both types of customers for the service that both consume jointly in order to recover the platform's costs and make a profit. A restaurant reservation service, for example, provides a valuable service only when it enables a person wishing to dine at a restaurant to make a reservation and a restaurant to take that reservation from that prospective

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[8] Examples include online marketplaces, stock exchanges, dating businesses, messaging platforms, and payment networks.

diner. The reservation service can charge the diner, the restaurant, or both for this service.

To determine whether a restraint is anticompetitive, where, as in the restaurant reservation example, the platform's matching services are joint and unseverable, the presumption at the first stage of the rule of reason should be to consider the impact on both sets of customers, on how much they jointly pay, and, ultimately, on the overall output of the jointly consumed service.[9] Conduct that increases the overall output of a service should be commended, not condemned, as that is a central virtue of competition.[10]

This is not a matter of burden shifting. There is simply no way to know, especially in the case of a platform that provides a service that customers on each side consume jointly, whether a practice is anticompetitive without at least considering both types of customers and the overall competition among platforms. That analysis must, therefore, happen at the first stage of the rule of reason to assess whether the conduct is anticompetitive or not.

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[9] As is always the case with the rule of reason, the inquiry ultimately concerns the impact of the conduct on the market price and output. *See, e.g.*, *NCAA* v. *Board of Regents*, 468 U.S. 85, 113 (1984) (calling higher prices and lower output "hallmarks of anticompetitive behavior").

[10] The *Amici* Economists want to discourage the courts from looking at the standard signals of competitive harm—price and output—because, despite received antitrust doctrine, they contend that lower prices and higher output may be undesirable. *See* Petitioner *Amici* Economists' Br. 12 n.15, 20, 34-35.

The assertion by the Petitioners and some of the *Amici* in support that the relevant antitrust market for a two-sided platform *always includes* the side of the platform on which the conduct has occurred and *always excludes* the other side of the platform conflicts with sound economics and is clearly wrong for platforms that provide services that are jointly consumed, and unseverable, by the customers on each side. In such cases there is a single service that is subject to competition, and it is that service that is interchangeable among the customers that use it. For example, while the benefits that diners and restaurants each obtain from an online reservation service are not reasonably interchangeable, the service they jointly consume *is* reasonably interchangeable with services provided by other online restaurant reservation services.

The U.S. Department of Justice, Petitioner *Amici* Law Professors, and Petitioner *Amici* Economists write as if they are asking the Court to conduct rule of reason business as usual. In fact, they are insisting that the courts *always* view *all* platform enterprises through a uniquely narrow and distorted lens. We urge the Court to reject this request and, instead, to take business reality and the facts on the ground into account in applying the rule of reason to two-sided platforms, as courts do in cases involving all enterprises. There will be matters—especially involving platforms that provide joint and unseverable matching services—in which, to minimize errors, the courts will need to consider both sides of a platform. There will also be some cases in which it may be pos-

sible to address certain issues by considering only one side of a platform.[11]

ARGUMENT

I. Two-Sided Platforms Are Enterprises For Which The Demands Between Different Types Of Customers, Connected By The Platform, Are Interdependent

Two-sided platforms enable two distinct types of participants to interact more readily and realize gains from trade or other interaction.[12] They provide each customer group with access to the other customer group. The key technical feature is that the demand for the platform service by each type of participant depends on the demand for the platform service by the other type of participant as a result of ex-

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[11] We agree with the Second Circuit's conclusion in *American Express* that the Plaintiffs failed to establish—taking both sides into consideration—that the challenged provisions resulted in anticompetitive effects because there was no evidence that the provisions resulted in an overall increase in price and, most importantly, an overall decrease in the output of transaction services. We do not believe, however, that the Court should mandate a mechanical application of the framework used by the Second Circuit in all cases involving two-sided platforms regardless of the business, competitive dynamics, conduct, or fact-patterns.

[12] Two-sided platforms are a special case of multisided platforms, which can serve two or more distinct groups of customers. We consider two-sided platforms here to simplify the discussion but the analysis applies to platforms with more than two sides.

ternalities between the two types of participants.[13] It is now generally recognized in industrial organization economics and business strategy that the interdependency of demand for the two customer groups can have significant economic ramifications.

The relevant literature, which started in 2000 with the circulation of a working paper version of Rochet and Tirole's seminal contribution, is now 17 years old, encompasses hundreds of published papers, several major books, and is a standard and noncontroversial part of the modern industrial organization literature.[14] The basic insights of the economic literature are now widely discussed in nontechnical books and media, have diffused widely through the business world, and are applied in business decisions.[15]

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[13] The Petitioner *Amici* Economists note that the fact that raising the price on one side of a platform decreases demand on the other side is similar at the level of abstract theory to the relation between prices and demands for complements, like tennis racquets and tennis balls. Petitioner *Amici* Economists' Br. 4-5. This neglects a fundamental difference in business reality between the two situations: a platform *must* serve both its sides, because it is in the business of connecting them, while many businesses sell one complement (tennis balls) but not the other complement (tennis racquets).

[14] *See United States Telecom Ass'n* v. *FCC*, 825 F.3d 674, 754 (D.C. Cir. 2016) (Williams, J., concurring in part, dissenting in part) (referring to "the vast scholarly treatment" of two-sided markets).

[15] For key theoretical contributions see Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. Eur. Econ. Ass'n 990 (2003); Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND

Footnote continued on next page.

Potential platform participants often make two distinct decisions. They decide whether or not to join a platform so that they have the option to use it. In the case of a ride-sharing service, drivers have to sign on to drive for the service, and passengers need to install an app and set up an account. Having joined a platform, participants make decisions on how much to use it. Drivers have to decide how much to drive for a particular service. Passengers have to decide how many rides to take on that service.

A platform may set both access prices for joining the platform and transaction prices for using it for each set of participants. The economic theory of two-sided platforms shows that profit-maximizing access and transaction prices can be less than the marginal cost of provision, and can even be zero or negative, subject to at least some of these prices being suffi-

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J. Econ. 645 (2006); Mark Armstrong, *Competition in Two-Sided Markets*, 37 RAND J. Econ. 668 (2006); and E. Glen Weyl, *A Price Theory of Multi-Sided Platforms*, 100 Am. Econ. Rev. 1642 (2010). For nontechnical surveys, see Marc Rysman, *The Economics of Two-Sided Markets*, 23 J. Econ. Perspectives 125 (2009); David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multisided Platform Businesses*, in 1 Oxford Handbook Int'l Antitrust Econ. 404 (Roger D. Blair & D. Daniel Sokol eds., 2014). The online appendix to our Oxford Handbook paper lists over 350 significant economic articles published through December 2012; *see* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185373. The Harvard Business Review has been publishing articles for managers on two-sided platforms since 2006. *See* Thomas Eisenmann, Geoffrey Parker, & Marshall W. Van Alstyne, *Strategies for Two-Sided Markets*, 84 Harv. Bus. Rev. 92 (2006).

ciently above marginal cost so that the platform earns a profit. These access and transaction prices affect the overall use of the platform. How they do so depends on the structure of demand for the participants to join the platform and to use the platform after having joined. It is common, though certainly not universal, for two-sided platforms to lose money on one side of the platform.

Beyond this basic description, two-sided platforms, like traditional enterprises, are diverse. The courts will see many platforms that bear little apparent similarity to the credit-card network at issue in this matter. That is apparent from comparing credit-card networks to newspapers and both to ride-sharing services.

The diversity of platform enterprises, however, is not fundamentally different from the diversity of single-sided enterprises and does not pose any challenge the courts have not successfully met before. This diversity is certainly not a basis for requiring courts to ignore information that may be relevant to a sound assessment of whether challenged conduct is anticompetitive or not.

II. Old And Recent Cases Show Why The Court Should Eschew A Rigid Approach, Which Can Result In False Negatives And False Positives

The Court's decision in *Times-Picayune*, relied on by Petitioners, illustrates how different modes of

analysis can make economic sense in practice, depending on the violation alleged, the specific issue considered, and the facts on the ground.[16]

In analyzing whether this newspaper publisher, a two-sided platform for readers and advertisers, engaged in a Section 1 tying violation by requiring advertisers to place ads in one publication as a condition of placing ads in another publication, the Court could dispose of the issue based on its finding that advertisers had sufficient choices of where to place ads so that the business leverage necessary for an anticompetitive tie was absent.[17] There was no apparent reason to examine the impact of the tie on readers to assess whether there was an antitrust violation involving tying, given the Court's treatment of tying at that time.[18] Moreover, for the purposes of assessing whether the newspaper publisher had the bargaining leverage to impose an anticompetitive tie, it was sufficient to consider only competition for advertising.

In contrast, in analyzing whether the newspaper publisher engaged in predation in violation of Section 2,[19] the District Court examined whether the

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16 *See Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 (1953).

17 *See id.* at 611-13.

18 One could imagine other sets of facts that would make it necessary to consider both sides for a full understanding of anticompetitive and procompetitive effects in tying cases.

19 Compl. at 6-9, *United States* v. *Times-Picayune Publishing Co.*, 105 F. Supp. 670 (E.D. La. 1952).

platform as a whole—taking both readers and advertisers into account—was operating at a loss.[20] The District Court compared revenue from both sides and the costs on both sides.[21] This two-sided arithmetic helped support the District Court's conclusion that there was no Section 2 violation, a conclusion the Court accepted without criticism.[22] Since newspapers typically lose money on the reader side and make money on the advertising side, it would not have made economic sense, and would have ignored business reality, to look at either side in isolation for the purposes of the analysis of the allegation of predation.

Predatory pricing makes particularly clear how the failure to account for the interdependent demand between the two sides can result in a tribunal concluding that conduct is anticompetitive when it plainly is not (a false positive), and finding that con-

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[20] *United States* v. *Times-Picayune Publishing Co.*, 105 F. Supp. at 677 (evaluating arguments about allocating "revenues and expenses" from both "advertising and circulation" in determining whether one of the defendant's two papers "was operated at a loss").

[21] As a matter of economics this approach is equivalent to comparing the overall price charged by the platform, based on a weighted average across readers and advertisers, and the overall operating costs incurred by the platform, based on a weighted average across readers and advertisers. This approach is consistent with the two-sided price-cost comparison we recommend in our Oxford Handbook paper. *See* Evans & Schmalensee, *supra* note 15, at 423-25.

[22] *See Times-Picayune Publishing Co.* v. *United States*, 345 U.S. at 626-27.

duct is not anticompetitive when it plainly is (a false negative).

A tribunal could reach a false positive conclusion if it found predatory pricing based on the platform charging a below-cost price on one side.[23] That is common profit-maximizing behavior for two-sided platforms even when they operate in competitive industries. A French commercial court made just that mistake in finding that Google Maps engaged in predatory pricing by providing websites with free mapping software.[24] A Paris Appeals Tribunal reversed,[25] relying on an opinion by the French Competition Authority. This opinion, along the same lines as the District Court's in *Times-Picayune*, states that revenue and cost on both sides of the platform should be considered.[26]

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[23] For a survey of issues in analyzing predatory pricing cases for two-sided platforms see Andrea Amelio, Liliane Karlinger, & Tommaso Valletti, *Exclusionary Practices and Two-Sided Platforms*, OECD Directorate for Financial and Enterprise Affairs Competition Committee (2017), https://one.oecd.org/document/DAF/COMP/WD(2017)34/FINAL/en/pdf.

[24] Tribunal De Commerce [TC] [ordinary court of original jurisdiction] Paris, Jan. 31, 2012, Case No. 2009061231.

[25] Cour d'appel [CA] [regional court of appeal] Paris, civ., Nov. 25, 2015, Case No. 12/02931.

[26] Autorité de la Concurrence [French Competition Authority], *Rendu à la Cour D'appel de Paris Concernant un Litige Opposant la société Bottin Cartographes SAS aux sociétés Google Inc. et Google France* [Report to the Paris Court of Appeals Concerning the Litigation between Bottin Cartographes SAS and Google Inc. and Google France] ¶ 50 (Dec. 16, 2014).

A court could also make a false negative finding. Suppose, contrary to the actual facts, that Times-Picayune Publishing had reduced advertising prices for its evening paper without raising prices to readers and that, although the advertising prices were greater than the cost of providing advertising, doing so resulted in operating the evening paper at an overall loss because of losses on the reader side. Assume further that this pricing structure had forced its rival out of business, since it could not match the lower advertising prices without sustaining large losses, and that Times-Picayune Publishing then recouped through higher reader and advertiser prices.

If the District Court had defined an advertising-only market and evaluated the predatory pricing claim based only on whether price was greater than cost in that market it would have, in this hypothetical, concluded that the Times-Picayune Publishing had not engaged in predatory pricing when in fact it had run the newspaper at a loss. The two-sided approach actually adopted by the District Court in 1952 would have saved it from making that false negative determination.

False negatives and false positives can result for any rule of reason analysis in which the finder of fact ignores one side of a platform. There may be situations in which the interdependence between the two sides of a platform is unimportant or can be neglected because of the particular issue at hand. As in any rule of reason inquiry, however, the courts should analyze the challenged conduct in light of business realities and the overall fact pattern before deciding what evidence to consider.

III. When A Platform Provides A Service That Is Jointly And Unseverably Consumed By Two Types Of Customers, There Is A Heightened Risk Of Errors From Analyzing Impact On Only One Type Of Customer

For platforms that provide two groups of customers with a service that they must consume jointly, and where the challenged conduct necessarily affects both types of customers, there is a strong presumption that, as a matter of economics, the rule of reason analysis, at the first stage, should consider the impact of the challenged conduct on both groups of customers.

Joint consumption is not an essential aspect of the services provided by many platforms. People can watch ad-supported television, enjoy the content, and ignore the ads, for instance. Although advertisers hope that enough consumers will pay attention to their ads to justify the cost, content and ads are not necessarily consumed jointly. Providing content and providing ads are severable. It is possible to provide content without ads, and some consumers are willing to pay for programming without ads. As a result, two-sided ad-supported television faces competition from single-sided premium cable channels and streaming video providers.

Some platforms, however, provide a service that by its very nature must be consumed by two customers jointly and cannot be provided separately to one or the other. Consider an equity exchange such as Nasdaq. The service involves helping buyers and

sellers find each other and engage in trades. The service is consumed jointly. The buyer and seller agree to terms and then consummate a transaction. The exchange service is also unseverable since it is not possible to provide it just to buyers or just to sellers. Any enterprise that wants to be in this business must provide the service to both groups.

When a service is provided jointly, a party and a counterparty stand at opposite ends of the service. In some cases, the same platform participants could be on either end of the service depending on their circumstances. People can be both senders and receivers of messages on a messaging platform (e.g. WhatsApp) at different times and be both senders and receivers of funds on a person-to-person money-transfer platform (e.g. Venmo). In other cases, the parties and counterparties are necessarily distinct. Heterosexual dating platforms (e.g. Match.com) connect members of opposite sexes, and payment card networks (e.g. Visa) connect cardholders and merchants.[27]

In all these cases, the platform must decide how to split the cost of the service between the parties

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[27] American Express competes with Visa, MasterCard, and Discover, among others, for transactions between consumers and merchants. Visa and MasterCard operate B2B networks in which credit card issuers (e.g. Chase) sign up and service consumers, and merchant acquirers (e.g. First Data) sign up and service merchants. Visa and MasterCard, however, shape the pricing structure through interchange fees and establish general rules, including ones similar to American Express's, that govern merchants and consumers. *See* Pet. App. 81a-90a.

that consume it jointly and unseverably. OpenTable, for example, charges restaurants $1.00 and diners $0.00 for reservations made through the platform.[28] The price it charges for a reservation would still be $1.00 if it charged restaurants $0.75 and diners $0.25 for each reservation or any other set of numbers that added up to $1.00.

It would not make economic sense to analyze the conduct of a platform that provides a service that is consumed jointly by looking only at what customers on one side pay for the service and receive from it. Businesses of this sort never provide a transaction to only one side of the service, and every interaction has a party and a counterparty that both benefit from the service.

The economic surplus generated by each interaction equals the total difference between the values both parties place on the interaction minus the total costs they incur. The platform determines the division of this surplus between the two sides through the prices it charges each. Competition between platforms that provide joint and unseverable services, like competition between ordinary single-sided businesses, leads to greater economic surplus by encouraging lower prices, better quality, and higher output.

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[28] We have simplified this pricing structure to aid exposition. In fact, OpenTable also charges restaurants a monthly access fee and provides reward points to diners based on how many reservations they make so diners pay a negative transaction fee. *See* David S. Evans & Richard Schmalensee, *Matchmakers: The New Economics of Multisided Platforms* 9-12 (2016).

A platform with market power that provides a service that is consumed jointly and unseverably by consumers could, like any other firm with market power, engage in conduct that would harm competition. Evidence on whether the challenged conduct has made buyers worse off, or would be likely to do so, through some mix of higher prices, lower output, and lower quality would typically be important, or certainly useful, for that assessment. Conduct that, at the market level and taking both sides into account, does not reduce the quality of the service or raise the total cost of the service would ordinarily not reduce total market output or buyers' surplus.[29]

There is a strong presumption that conduct that affects one party to a jointly consumed service has an impact on the other party consuming that service and sharing its cost. In determining prices to maximize its profits, the platform must take the interdependent demands of both parties into account. Conduct that affects one side of the jointly consumed service necessarily affects the other side. Therefore, it would be necessary to consider both sides of the platform that provides the jointly consumed service

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[29] The Petitioners, and some of the *Amici* in support, claim that the total cost of the service to both types of customers is not relevant because competition should determine the relative prices to the two sides. *See* Ohio Br. 18, 42-46; Petitioner *Amici* Law Professors' Br. 4, 20, 23-24; Petitioner *Amici* Economists' Br. 15. It is not possible, however, to determine reliably if conduct has harmed competition and consumers through a distortion in relative market prices without considering both sides of a two-sided platform at the start of the analysis since competition takes place over both sides.

at the first stage of the rule of reason inquiry to determine whether challenged conduct has harmed consumers and the competitive process.[30]

Considering the impact of challenged conduct on both sides of the interaction is very different than the usual evaluation of procompetitive benefits in the second stage of a rule of reason inquiry.

First, it is possible that the conduct harms parties on which a restraint has not been imposed, and failure to consider both sides of the platform involved at the first stage of the rule of reason inquiry could lead to a false negative. A job-matching platform with market power, for example, might require employers to list jobs exclusively with it in exchange for lower prices. If this prevented the entry of other job sites, however, the firm imposing the constraint could charge higher prices to job-seekers. To properly assess whether challenged conduct harms competition, then, the first stage of the rule of reason inquiry should consider the impact of the conduct on both parties, most naturally by considering the impact on total market prices and market output.

Second, it is possible that the conduct benefits parties on one side of the platform. That benefit is part of the economic surplus generated by the interaction between the parties and should be accounted

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[30] In the case before the Court, the Second Circuit correctly decided that the government did not meet its burden in stage one since there was no evidence in the record that the conduct raised the market price of transaction services and, most importantly, reduced the market output of transaction services.

for in determining whether the practice reduces consumer welfare. Consider a money transfer platform that lowered prices to senders so they received a subsidy, and increased prices to receivers by a smaller amount, thereby resulting in a lower total price, higher demand, and greater output. Its pricing could look predatory on the sending side even though this change in pricing structure reduced the total price for money transfers and increased the output of money transfers. In this example, it is not that there are procompetitive benefits that offset anticompetitive effects. There are no possible anticompetitive effects to begin with.

And therein lies the fundamental error in the arguments about impermissible balancing put forward by the Petitioners and *Amici* in support. The first stage of the rule of reason analysis involves determining whether the conduct is anticompetitive. The economic literature on two-sided platforms shows that there is no basis for presuming one could, as a general matter, know the answer to that question without considering both sides of the platform.

IV. Market Definition Should Include Suppliers That Provide Significant Competitive Constraints

Market definition is normally an important step in the analysis of competitive effects. The basic principles for determining the relevant antitrust market are no different for platform enterprises than they are for other enterprises. The relevant antitrust market should consist of the suppliers that compete with the firm or firms of primary interest and impose

significant competitive constraints on that firm or those firms. That principle has been at the core of the economic analysis of market definition since the early 1980s.[31] It is essential that market definition faithfully reflect business realities to identify and assess competitive constraints from suppliers that compete with the firm or firms of primary interest.

A firm that operates a two-sided platform faces competitive pressures that restrain its ability to raise prices or restrict output that generally depend on both sides of the platform.[32] Consider, for example, competing shopping malls. If one mall decided to reduce its subsidy to shoppers—by charging for park-

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[31] The modern approach to market definition, with its emphasis on competitive constraints rather than mere interchangeability, is generally understood to have begun with the development by the U.S. Department of Justice of the 1982 Merger Guidelines. The basic approach in the guidelines is used by economists generally. *See* Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 Antitrust L.J. 253 (2003); Dennis W. Carlton, *Market Definition: Use and Abuse*, 3 Competition Pol'y Int'l 3 (2007); Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 Antitrust L.J. 49 (2010); *see also Comcast Corp.* v. *Behrend*, 569 U.S. 27, 44 (2013) (citing the most recent iteration of the Merger Guidelines).

[32] For surveys of the economic literature on market definition for two sided platforms see Lapo Filistrucchi, et al., *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. Competition L. Econ. 293 (2014) and Arno Rasek & Sebastian Wismer, *Market Definition in Multi-Sided Markets*, OECD Directorate for Financial and Enterprise Affairs Competition Committee (2017), https://one.oecd.org/document/DAF/COMP/WD(2017)33/FINAL/en/pdf.

ing or reducing amenities, for example—some of those shoppers would shift their demand to other malls. Because of that fall in traffic, the demand by retailers for locating at that mall would decline, and therefore the rents the mall could charge would be reduced. Competitive pressures on the retailer side therefore constrain the mall's ability to profitably lower the subsidy to shoppers.

The magnitude of these competitive constraints, however, and the relationship to challenged conduct, will vary across matters before the courts. Sometimes these cross-side competitive constraints could be economically significant, so that it would be a mistake to exclude competition for customers on one side from the set of competitive constraints on competition for the other side. In other cases, these cross-side competitive constraints could be small enough to ignore. In some cases, even though these cross-side competitive constraints are significant, it may be convenient to proceed at the first stage by assembling the competitive constraints separately for each side into two markets and then to consider the linkages between them.[33] In all cases, it is important at the first stage of the rule of reason analysis to respect the reality that two-sided platforms are in the business of linking their two sides.

The Justice Department, and the Petitioner *Amici* Law Professors and Petitioner *Amici* Economists, are asking the Court to *require*, as a matter of law,

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[33] For a discussion of considering linked markets versus a single market see Rasek & Wismer, *supra* note 32, at §§ 2.1-2.2.

that the relevant market for assessing challenged conduct by *all* platform enterprises *never include* competition for the customers on the other side of the platform. This rigid approach would exclude relevant competitive constraints on the conduct at issue and is therefore inconsistent with modern approaches to market definition. It would also prevent the courts from accounting for the business reality of platform enterprises when it is important to do so.

The fundamental error in imposing this novel limitation on the court is most clearly seen for platforms that provide services that are consumed jointly and unseverably. In that case participants are consuming the same service, just standing at different ends. Any enterprise that provides the service would have to compete for both types of customers. The value of the service to one type of customer depends on their ability to interact with the other type of customer. A platform that is more successful at attracting one type of customer necessarily makes it harder for its rivals to attract the other type of customer. Defining a market that included just one type of customer would be inconsistent with business reality, as there is no rational competition for one side without the other, and it would ignore the competitive constraints coming from competition for both groups.

The Petitioners, and the *Amici* in support, base their proposal for confining market definition for platform enterprises on two false premises.

The first false premise is that the purpose of market definition is to identify, mechanically, products that are interchangeable. Examining the extent to which consumers can substitute the products of different suppliers is often an important element in

identifying those suppliers that should be included in the market because they impose significant competitive constraints. However, the analysis of the interchangeability of products is not an end in itself.[34] It is just a means for helping the court identify relevant competitive constraints.[35]

The second false premise is that the interchangeability between the services received by opposing sides of a platform is somehow relevant for assessing competitive constraints. To see the error in their analysis, consider competition among person-to-person money transfer services. It is true that the service provided to a person who sends money is literally different from, and not interchangeable with,

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[34] *See* Werden, *supra* note 31, at 253; Frank H. Easterbrook, *Limits of Antitrust*, 63 Tex. L. Rev. 1, 22 (1984) ("Market definition is just a tool in the investigation of market power . . . .").

[35] It is not uncommon for courts and antitrust authorities to define relevant product markets that include products or services that most customers would not consider to be reasonable substitutes. For example, the market for hospital services may include heart transplants, brain tumor surgery, and appendectomies, which patients and doctors would not consider to be interchangeable. *See, e.g.*, *FTC* v. *Penn State Hershey Medical Center*, 838 F.3d 327, 338-45 (3d Cir. 2016) (including local hospitals that constrain the defendants' pricing of general acute care services and incorporating new economic learning for determining relevant geographic markets); *FTC* v. *Advocate Health Care Network*, 841 F.3d 460, 468, 471-73 (7th Cir. 2016) (including "abdominal surgeries, childbirth, treatment of serious infections, and some emergency care" in the relevant product market and adopting new economic learning for relevant market definition).

the service provided to a person who receives money. Defining separate markets for sending money and receiving money, however, would ignore the core business reality that suppliers compete for transactions between senders and receivers. The transactions between senders and receivers are substitutable across platforms. An increase in the price of the transaction by one platform—almost no matter how that price is divided between the sender and receiver sides—would tend to result in an increase in demand for other platforms.

In the cases of platforms that provide a service that is consumed jointly and unseverably, the observation that the customers are at different ends of the service is irrelevant and should not be used to excise important competitive constraints from the relevant market. Platforms that provide similar jointly consumed services are substitutes for each other, and their products are interchangeable as a matter of business reality. Market definition for platforms that provide services that are jointly consumed and unseverable should therefore focus on identifying suppliers that provide services that are interchangeable in this sense, which typically accords with business reality.

The Second Circuit applied these principles soundly in its decision in *American Express*. The District Court found that American Express provides transaction services jointly, and simultaneously, to cardholders and merchants in competition with other payment card networks that provide similar ser-

vices.[36] The relevant antitrust market should thus consist of those competing suppliers whose services are interchangeable.[37] To assess whether the conduct at issue in the case was anticompetitive at the first stage of the rule of reason analysis it is necessary to consider both parties to those transactions.[38] The Second Circuit found that the Plaintiffs had not met their burden because there was no evidence that the price of those transactions increased and, most importantly, there was no evidence that the conduct had reduced the market output of transaction services.[39]

CONCLUSION

The history of the application of the rule of reason shows the importance of allowing the courts to consider all economic evidence, including new economic learning, that is potentially relevant for determining whether conduct is anticompetitive or not.[40] There is

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[36] *See* Pet. App. 77a-81a.

[37] *See id.* at 32a-35a.

[38] *See id.* at 52a.

[39] *Id.* at 52a-53a (noting that the evidence at trial indicated both the quantity of transactions and the quality of card services increased and that Plaintiffs introduced no evidence indicating that prices for transactions increased).

[40] *See, e.g., Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 889-91, 897-99 (2007) (citing new economic learning as a justification for ending the per se illegality of vertical resale price maintenance agreements and guiding courts to take into account economic considerations when applying the rule of reason).

certainly no basis in economics for putting special blinders on the courts when it comes to considering platform enterprises, as requested by the Petitioners and some of their *Amici*. Doing so would be a radical departure from the approach that the Court has taken, with great success, in applying the rule of reason to a wide variety of businesses and a wide variety of conduct and fact patterns.

* * *

For the foregoing reasons, the rigid analytical framework recommended by the Petitioners and some of their *Amici* should be rejected and, particularly given the lack of evidence that the challenged conduct reduced the output of transaction services, the decision of the Second Circuit should be affirmed.

Respectfully submitted,

ELAI KATZ
Counsel of Record
LANDIS C. BEST
HELENA S. FRANCESCHI
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Amici Curiae Prof. David S. Evans and Prof. Richard Schmalensee

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IN THE

Supreme Court of the United States

STATE OF OHIO, *et al.*,
Petitioners,

v.

AMERICAN EXPRESS COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE INTERNATIONAL AIR TRANSPORT ASSOCIATION AND AIRLINES FOR AMERICA AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

JEFFREY N. SHANE
General Counsel
DANIEL KANTER
Assistant General Counsel
INTERNATIONAL AIR TRANSPORT ASSOCIATION

DAVID A. BERG
Senior Vice President & General Counsel
AIRLINES FOR AMERICA

DONALD I. BAKER
Counsel of Record
W. TODD MILLER
JESSE W. MARKHAM, JR.
LUCY S. CLIPPINGER
BAKER & MILLER PLLC
2401 Pennsylvania Avenue, NW
Suite 300
Washington, DC 20037
(202) 663-7820
dbaker@bakerandmiller.com

Counsel for the International Air Transport Association and Airlines for America

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

Whether, under the Sherman Act rule of reason, the Governments' showing that American Express's "anti-steering" provisions stifled network price competition on the merchant side of the credit-card platform suffices to prove anticompetitive effects and thereby shift to American Express the burden of establishing any procompetitive benefits from the provisions.

Whether the operator of a two-sided platform can justify under the Sherman Act its monopolistic exploitation or anticompetitive restraints in the market on the first side, because this profit-enhancing conduct can generate ongoing subsidies which the platform then uses to attract and retain users in the separate market on the second side.

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INTEREST OF *AMICI*[1]

The International Air Transport Association ("IATA") is a nongovernmental international trade association founded in 1945 by air carriers engaged in international air services. Today, IATA consists of 282 member airlines from 123 countries representing roughly 84 percent of the world's total air traffic. IATA strives to represent, lead, and serve the airline industry by advocating the interests of airlines across the globe, developing global commercial standards for the airline industry, and assisting airlines in operating safely, securely, efficiently, and economically. Since 1945, IATA has worked closely with governments and intergovernmental organizations to achieve and maintain a legal and regulatory framework everywhere consistent with the best interests of air transportation users.

Airlines for America ("A4A") is the nation's oldest and largest airline trade association, representing the leading passenger and cargo airlines of the United States. Its passenger carrier members and their marketing partners accounted for 72 percent of all U.S. scheduled passenger airline capacity and carried 593 million passengers in 2016. A4A advocates on behalf of its members to shape crucial policies and measures that promote a safe, secure, and healthy U.S. airline industry. It works collaboratively with airlines, labor, government agencies, Congress, and other groups to improve air travel for everyone. Since

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[1] No party's counsel authored this brief in whole or in part and no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. All counsel of record consented to the filing of this brief.

its inception, A4A has played a major role in significant government decisions regarding the aviation industry and it regularly participates in litigation that impacts commercial air transportation.

Credit card fees for passenger ticket sales represent a major cost for IATA and A4A members, and therefore IATA and A4A have been actively concerned on an ongoing basis about credit card fee levels and anticompetitive rules and practices employed by the major credit card networks.

IATA, A4A, and their members are anxious that the U.S. antitrust laws be enforced against the American Express ("Amex") "anti-steering" rule, which the District Court found to have reduced competition among card systems on the merchant side of the platform, and hence resulted in higher credit card fees being paid by airlines and other card-accepting merchants.

IATA and A4A members have a strong interest in this Court rejecting the kinds of justifications accepted by the Second Circuit for what should be clear Sherman Act violations in the distinct and separate market for merchant participation, irrespective of the fact that they were advanced in relation to a two-sided platform.

SUMMARY OF ARGUMENT

In the last 25 years, the Internet has led to the increasing prevalence and greatly enhanced economic importance of two-sided platforms. Credit card networks (e.g., Visa, MasterCard, and American Express) are prominent pre-Internet two-sided platforms that connect card-paying consumers with card-accepting merchants.

Each side of such two-sided platforms normally represents a separate and distinct market, with different competitive conditions on each side. Credit card networks are no exception. A network such as American Express or Visa enjoys substantial market power vis-à-vis merchants because a competitive merchant does not want to lose valuable transactions because it will not accept the consumer's preferred (or only) card. Each network has responded to this reality by charging merchants high "interchange" fees which are then largely used to incentivize the card-issuing institutions to issue the particular network's cards. The net result is that, on the card-issuing side of the platform, credit card networks vie to get card-issuers to actively recruit new cardholders and to encourage existing cardholders to use the issuer's card more often.

This whole picture was clearly documented by the District Court after a seven-week trial in which the court found that the American Express anti-steering rule reduced competition among the networks in the "merchant servicing" market and thus resulted in higher credit card servicing fees to merchants.

The Second Circuit, ignoring these detailed findings, held that a trial court had to (1) combine the two sides of the platform (involving different participants and non-interchangeable transactions) into a single aggregated market and then (2) use the rule of reason to balance merchant losses against the value of the "rewards" that card-issuers gave to consumers to encourage use of their cards (which are largely funded by the merchant fees that are the source of the merchant losses).

The Court of Appeals' "apples and oranges" approach to market definition is entirely inconsistent

with the well-developed antitrust approach to assessing anticompetitive conduct, and it makes no economic sense. It is also inconsistent with established legal precedents, including those relating to the two-sided newspaper industry, which is characterized by advertising sales on one side of the platform and newspaper subscriptions on the other—both are distinct and separate relevant antitrust markets. *See Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 610 (1953).

It is important that the Court correct the Second Circuit's novel and erroneous approach, and make clear that anticompetitive restraints normally have to be analyzed separately on each side of a two-sided platform.

ARGUMENT

I. THIS CASE GIVES THE COURT A TIMELY OPPORTUNITY TO CLARIFY THE ANTITRUST RULES FOR TWO-SIDED PLATFORMS WHICH HAVE BECOME INCREASINGLY IMPORTANT IN TODAY'S INTERNET-BASED SERVICES ECONOMY.

The Internet has caused multi-sided platforms to proliferate. Some of the more familiar platforms connect buyers with sellers (e.g., OpenTable), while other platforms connect advertisers with consumers of advertising content (e.g., Google and Facebook). However, while consumers are familiar with how they interact with the side of a platform facing them, they generally are less familiar or even unfamiliar with the competitive dynamics on the other side of the platform.

The two-sided credit card platform and the fees paid by airlines as merchants have a major impact on the airline industry, but it is only one of a number of such two-sided platforms that significantly impact airlines. Travel ticket distribution intermediaries (known as Global Distribution Systems or GDSs), like Sabre, Travelport, and Amadeus, connect travel agents with travel suppliers, including members of IATA and A4A.[2] And airlines, like most major businesses, advertise on social media and other Internet publishers, participating in two-sided platforms that involve consumers of information on one side of the platform and advertisers on the other.

These two-sided platforms are often unique in the manner in which the people and entities participating in the separate market on each side of the platform are affected by competition. For instance, Uber is a two-sided platform, matching drivers on one side of the platform with passengers on the other. It competes with other ride-share companies, like Lyft, taxi companies, and town car companies for both drivers and riders. However, the platform is also entirely

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[2] However, in a recently concluded trial in the Southern District of New York, a federal jury properly characterized the GDS market as one-sided from an economic standpoint, and therefore correctly analyzed the effect of GDS anti-steering rules only on travel suppliers, without regard to benefits GDSs may provide to travel agents that supplier payments fund. Sabre has filed a currently pending appeal to the Second Circuit, arguing, based on the Court of Appeals' opinion in this case, that *all* two-sided electronic platforms need to have their economic effects analyzed by looking at whether the restraints at issue on the merchant side of the platform are offset by benefits to users on the other side. *See U.S. Airways, Inc. v. Sabre Holdings Corp., et al.*, Case No. 17-960 (2d Cir. 2017).

distinct from the two-sided credit card platforms. Unlike merchants, drivers do not set their own prices from which a fee is then taken; instead, drivers receive a percentage of the fare set by Uber without the drivers' input. *See O'Connor v. Uber Techs.*, 82 F. Supp. 3d 1133, 1142 (N.D. Cal. 2015). And, of course, lower barriers to entry, that passengers can bicycle or drive their own cars, and that drivers can get other jobs (as drivers or doing other work) keep the markets for both drivers and passengers competitive.

However, in both the case of Uber and the case of credit cards, treating the two-sided platform as a single market rather than two distinct markets would lead to absurd results. Would Uber be free to engage in anticompetitive restraints in the market for drivers as long as both Uber and Uber passengers benefited in some manner? Could it do so even if Uber's conduct increased the prices paid by all passengers, whether in taxis, Ubers, or Lyfts?

The Court of Appeals' decision raises a multitude of similar questions. It even leaves open the question of whether competitors could be permitted to divide markets or engage in other activities that would normally be *per se* illegal under Section 1 of the Sherman Act, so long as some consumers benefit even if others are harmed. *See Cal. ex rel. Harris*, 651 F.3d 1118, 1137 (9th Cir. 2011) ("where, as here, the conduct at issue is not a garden-variety horizontal division of a market, we have eschewed a *per se* rule and instead have utilized rule of reason analysis" (internal quotation marks omitted)). Such a rule would undermine the central policy of antitrust law: protecting consumers from restraints of trade. In this case, Amex's anti-steering rules cause most consumers to suffer net harm by higher prices because

competition was restrained on one side of the platform, while a subset of cardholders with high-reward cards may be better off. Antitrust law should not allow this result.

The Court of Appeals' decision would render those on the merchant side of a two-sided platform vulnerable to anticompetitive behavior because economic necessity forces those merchants to participate in a dominant platform to be able to access the largest number of customers, even when the platform is an exploitative monopoly. *See* Pet. App. 162a-163a. The proliferation of major two-sided platforms in the Internet age makes this an appropriate time for the Court to articulate clear rules for two-sided platforms that are manageable for district courts to administer and that protect competition on both sides of these platforms; each side must be considered its own separate and relevant antitrust market.

II. THE SECOND CIRCUIT'S MARKET-CONFLATING ANALYSIS IGNORED CREDIT CARD MARKET REALITIES IN THE DISTRICT COURT'S FINDINGS.

A. Competition and Market Power in Credit Card Markets

Credit card networks are based on an unusual economic reality—the person who makes the critical choices (the consumer) does not pay the fees associated with her choices. And thus we have gradually evolved a credit card system in which consumers are encouraged to make the least efficient (i.e., most expensive) choices from the standpoint of the merchants who have to pay for the consumer's choice. The credit card networks' anti-steering rules were

designed to reinforce consumers' likelihood of making inefficient choices by keeping them in the dark regarding those inefficiencies.

In a credit card network, the issuers of cards dominate a market in which merchants must participate if they do not want to lose sales by failing to accept potential customers' card of choice. As a result, merchants have to "multi-home" on the major credit card platforms. Responding to this reality, the major credit card systems (Visa, MasterCard, and American Express) have set up competing network systems with substantial interchange fees which are charged to merchants. These fees then flow back to the issuer of the card that the consumer used for the transaction. The routing of the transaction controls which network's interchange fee is charged, and routing is based on which card the consumer has chosen to give to the merchant at the point of sale.

In order to encourage consumers to sign up for and use its card(s), a card issuer will use some of its interchange fee revenues to provide rewards (e.g., free travel using airline miles purchased from an airline) or special discounts on transactions using the card. Generally, the higher the rewards are for use of a particular card, the higher the network interchange fee charged to the merchant for a transaction using the card.

Amex's business strategy is fundamentally based on this reality—so its merchant fees are higher than any other system, and its rewards program is among the most generous in the industry. Its card business is quite profitable because the total merchant fees that it collects are more than twice its total costs of providing cardholder rewards or discounts. Even the Court of Appeals recognized, and "Amex conceded," that "not

all of Amex's gains from increased merchant fees are passed along to cardholders in the form of rewards." Pet. App. 51a. In fact, as the United States pointed out in its brief, "Amex spends less than half of its merchant fees on cardholder rewards." Brief of the United States as Respondent Supporting Petitioners at 48 (citing Pet. App. 210a-211a; Tr. 3853).

Airlines (and presumably other merchants, too) build average credit card transaction costs into their prices—impacting all passengers whether or not they use a credit card.

In the end, card-issuers have substantial market power vis-à-vis the merchant as reflected by the anticompetitive behavior exhibited by the credit card networks towards merchants. The result is that credit card networks offer a classic example of dramatic competitive imbalance between the markets on each side of a two-sided platform—with monopolistic power on one side of the platform maintained by the enforcement of anti-steering rules.

In a more competitive market for these network services, merchants would be in a position to play one service against another to achieve lower merchant fees. A merchant could then charge consumers using credit cards more for transactions that cost the merchant more in credit card fees, thus tending to reduce system-wide costs. This is what the Amex anti-steering rule is designed to prevent at the point of sale—i.e., to prevent the consumer from choosing a lower-fee card based on information or incentives provided by the merchant. In the current system, these fees flow through to the card issuer, which uses some of this profit center to offer rewards that lure uninformed consumers to sign up for and then use their cards.

This is the competitive reality that was ignored by the Court of Appeals after it had been so carefully described by the District Court.

B. The District Court's Findings

The United States District Court for the Eastern District of New York conducted a seven-week bench trial after which it made detailed factual findings based upon a voluminous evidentiary record. Pet. App. 72a-73a. These factual findings are undisturbed by the Second Circuit, and yet undermine its basis for reversal.

The District Court concluded as a factual matter, based on ample evidence, that the relevant product market for evaluating the anti-steering rule is the market for card network services. "Competition in the GPCC [General Purpose Credit and Charge] card industry occurs on at least two distinct yet interrelated levels: (1) at the card issuance level, where American Express and Discover compete against each other and against the thousands of Visa- and MasterCard-issuing banks; and (2) at the network services level, where Visa, MasterCard, American Express, and Discover compete." Pet. App. 117a-118a.

The court also found as a factual matter that:

> American Express does possess antitrust market power in the GPCC card network services market sufficient to cause an adverse effect on competition. Specifically, the court finds that Defendants enjoy significant market share in a highly concentrated market with high barriers to entry, and are able to exercise uncommon leverage over their merchant-consumers due to the amplifying effect of cardholder insistence and derived demand. In addition, American Express's

> ability to impose significant price increases during its Value Recapture initiatives between 2005 and 2010 without any meaningful merchant attrition is compelling evidence of Defendants' power in the network service market.

Pet. App. 150a.

The court specifically found as to Amex that "the degree to which its cardholders insist on using their Amex cards affords the network significant power over merchants, particularly in a market in which merchants' primary recourse when faced with a price increase or similar conduct is an 'all-or-nothing' acceptance decision." Pet. App. 159a-160a (citing testimony of Plaintiffs' economics expert). The District Court also found ample evidence to support its conclusion that competition for card users, via such benefits as reward programs, operated in a way that was integrally related to, *but distinct from*, competition among card systems for merchant contracts. Pet. App. 116a-122a.

Ultimately, the District Court found, again on evidence that is undisturbed by the Second Circuit, that the anti-steering rules "allowed all four networks to raise their [merchant] fees more easily and more profitably than would have been possible were merchants permitted to influence their customers' payment decisions." Pet. App. 207a. Thus, these rules harmed both merchants and consumers: "the court finds that the challenged restraints have impaired the competitive process in the network services market, rendering low-price business models untenable, stunting innovation, and resulting in higher prices for merchants and their consumers." Pet. App. 192a.

The Court of Appeals fundamentally objected, accusing the District Court of having "defined [the network services market] in a conclusory manner." Pet. App. 37a. The appellate court reasoned that the trial court should have applied the "hypothetical monopolist test" to determine whether Amex could profitably increase merchant fees without losing profits from the consumer side of the two-sided platform. Pet. App. 38a-40a.

That was clear error on the part of the Second Circuit. The trial court specifically found, again on voluminous evidence, that Amex *actually did profitably impose higher merchant fees, unconstrained by competition*:

> By precluding merchants from directing transactions to other networks, Amex's merchant restraints blocked an important safety valve that would have moderated its efforts to increase discount rates. (*See* Tr. At 3846:1-15, 3850:8-17 (Katz).) Among large merchants, for example, American Express did not even account for the possibility that merchants would respond to its price increases by attempting to shift share to a competitor's network when assessing the likely profitability of Value Recapture, and instead considered only whether merchants would cease acceptance altogether as a result of the initiative. (*See id.* at 3849:10-3850:17 (Katz); PX1099 at '555.)

Pet. App. 208a. Amex determined that steering by smaller merchants would not have a sufficient impact to make raising its discount fees unprofitable. *See id.*

The Court of Appeals also ignored the clear adverse effect on consumers that was detailed in the District Court's opinion:

> The [anti-steering rules] have also resulted in increased prices for consumers. Merchants facing increased credit card acceptance costs will pass most, if not all, of their additional costs along to their customers in the form of higher retail prices. (*See* Tr. At 3840:10-23, 3854:18-3855:25 (Katz) (testifying that 'an economically rational merchant is going to pass [the higher costs of accepting payments] on to its customers,' and 'prices are going to go up with the merchant for everybody'); *see also id.* at 1405:22-1407:11 (Rein/Walgreen); DX2214 at '983.).

Pet. App. 210a-211a.

This is the basis for IATA and A4A's concern. Airlines, like other merchants, have to account for merchant fees when setting their air fares—so their cash or check-paying passengers, or passengers using cards for which lower merchant fees are imposed, are paying more than they would if credit card fees were lower.

III. THE SECOND CIRCUIT'S ERROR ON THE TWO-SIDED PLATFORM ISSUE NEEDS CORRECTION.

The Second Circuit's decision involved a failure to face a series of realities, which are economic, legal, and practical.

A. Need for an Economically Rational Market Definition

The Second Circuit's conflation of the two-sided, two-market platform into a single relevant antitrust market is unsound as a matter of antitrust policy. To conflate the markets on each side of a two-sided platform into a single relevant antitrust market both unleashes inefficient market conduct and imposes impossible burdens on litigants and courts. If left standing, the Second Circuit's approach would free dominant players on one side of two-sided platforms (Google, Uber, Facebook, etc.) to exploit their monopoly power with apparent impunity. Moreover, faced with antitrust challenges to such conduct, courts would be left with an impossible task of balancing anticompetitive harms to victims on one side of the market against purported benefits to entirely different groups on the other side. The Court of Appeals offered no guidance on how a court (let alone antitrust counsel trying to guide clients along permissible lines) would begin to calculate the net effects.

Of course, the competitive conditions for any given two-sided platform may differ, so the effects of restraints on each such platform merit discrete analysis. However, applying a "benefits balancing" process to credit cards shows the deficiency in the Second Circuit's relevant market analysis. The merchant side of the platform is obviously harmed by higher fees. What benefit does an airline get from paying higher merchant fees to American Express? These fees are in part used by Amex to fund consumer rewards, thus inducing consumers who already have a Visa card to use the very card (Amex) that imposes the highest cost on the airline. Whatever benefit the consumer perceives herself to get from this system is

less than the cost to the merchant, and is also diminished by the higher prices the merchant is likely to charge all customers.

This Court already decided long ago that two-sided platforms form part of two separate and distinct relevant antitrust markets. *Times-Picayune Publishing Co. v. United States* involved a publisher's alleged tying of morning and evening advertisement placements, which this Court declined to condemn in part because there were no separate products thus "tied." In so ruling, the Court acknowledged that "every newspaper is a dual trader in separate though interdependent markets; it sells the paper's news and advertising content to its readers; in effect that readership is in turn sold to the buyers of advertising space. *This case concerns solely one of these markets.*" *Times-Picayune*, 345 U.S. at 610 (emphasis added).

Since then, antitrust law has settled squarely on the definition of relevant markets by cross-elasticity of demand, or substitutability of products. Card payment network services constitute one product; card issuance to consumers is quite another. They are not substitutes for either the consumer or the merchant: an airline negotiating a merchant agreement with Amex does not regard an airline ticket as a substitute for the network services it is seeking; a consumer looking to fly from New York to Cleveland does not regard network services as a substitute for a seat on an airplane. The fact that the two sides are *interdependent* is entirely different from saying that they are *interchangeable*.

B. Need to Respond to Clear Anticompetitive Effects

The essential problem is that the Second Circuit, to use the words of the trial court, takes its two-sided platform analysis "too far." Pet. App. 117a. Its flawed application of the hypothetical monopolist test would allow a monopolist to engage in otherwise illegal conduct victimizing one group so long as its activities somewhere else benefitted some other group in a related market. This view of two-sided platforms departs from precedent.

As the District Court analyzed in detail, the history of the credit card industry demonstrates that Discover attempted to introduce competition in the merchant market through low-price merchant fees two decades ago, but was thwarted by the other networks' anti-steering rules. Pet. App. 203a-206a. There is no sound reason to allow that outcome: as a matter of unarguable economics, higher fees paid by merchants *mean* higher prices to consumers. And since not all, or even most, of these consumers use Amex cards, whatever benefits Amex might bestow on its own cardholders are irrelevant to a clear majority of the consuming public.

Furthermore, the Second Circuit failed to consider how a District Court should analyze a restraint that normally falls under a *per se* review. Suppose, for example, that a dominant newspaper in a region agreed to pay another publisher not to enter the market. Would the Second Circuit analysis still require a district court to balance the harm to advertisers (who would lose a potential competitive source) against the benefit to readers (who arguably

might get lower subscription prices or better news coverage from a more profitable newspaper)?[3]

C. Need for a Practical Litigation Mandate

The Second Circuit's resolution of the two-sided platform issue is also impractical from a litigation and counseling standpoint. Trial courts are ill-equipped, and even ill-advised, to weigh competitive burdens to one group (merchants) against purported rewards to another (consumers). Consider Amex's conduct in the context of the airline industry: a district court would be expected to weigh anticompetitive costs to the airlines against whatever part of the issuer's supracompetitive profits might be shared with consumers in a separate market, as well as the consumer harm passed through by the airlines. How would a court calculate the marketplace benefits of consumer entitlement to rewards (which might or might not be exercised) against the costs to the airlines coupled with the consumer cost of merchant fees passed on?

Just as importantly, how would any enterprise or its antitrust counsel be able to predict the outcome? Counselors could not practicably predict whether economic benefits to one group would be as important to the marketplace as the harm imposed on another group.

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[3] That this should be a political choice, not a judicial one, is illustrated by the Newspaper Preservation Act of 1970, 15 U.S.C. §§ 1801, et seq., where Congress did exactly this. This statute permitted, under an exemption that had to be authorized by the Attorney General, two newspapers in a community to agree on advertising if this action was necessary for both papers to survive. *See* 15 U.S.C. §§ 1802(2), 1803.

The Second Circuit's approach to two-sided platforms necessarily embroils a trial court in the very administrative quagmire that this Court tried to avoid with its decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), where it held that indirect purchasers could not sue for antitrust damages under federal law. The Second Circuit would require the trial court to evaluate the effect on the cardholder side of the market in order to draw any conclusion about the restraint imposed upon merchants on the network services side. But as the District Court found in the current case, the net effect on cardholders includes the amount of overcharges passed through to consumers by merchants. As this Court observed in *Illinois Brick*, tracing pass-through costs from upstream misconduct is unworkable: "the attempt to trace the complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate and reduce the effectiveness of already protracted treble-damages proceedings . . . ." 431 U.S. at 732. How would a court ascertain the amount by which a sandwich shop increased the price of a BLT as the result of the unlawful portion of a merchant fee? The Second Circuit failed to address this inconsistency with established precedent, and imposes an unworkable standard.

The lack of a practical and predictable framework for two-sided platforms under the Second Circuit approach would leave district courts an exceptionally difficult challenge of how to run a trial under the modern rule of reason. The vast amount of economic activity on relatively new and emerging two-sided platforms, and the expanded reach of the rule of reason under recent case law, make it imperative that this Court clarify the law and impose a more efficient

and workable order consistent with antitrust law policy.

CONCLUSION

Taking all these factors together this Court ought to make clear that, in judging monopolistic conduct or anticompetitive restraints that occur on one side of a two-sided platform, a district court should normally (1) treat that market as being distinct from the market on the other side, and (2) apply normal antitrust rules to the anticompetitive or monopolistic conduct in that market, as the District Court did in this case.

Respectfully submitted,

JEFFREY N. SHANE
General Counsel
DANIEL KANTER
Assistant General Counsel
INTERNATIONAL AIR
TRANSPORT ASSOCIATION

DAVID A. BERG
Senior Vice President &
General Counsel
AIRLINES FOR AMERICA

DONALD I. BAKER
Counsel of Record
W. TODD MILLER
JESSE W. MARKHAM, JR.
LUCY S. CLIPPINGER
BAKER & MILLER PLLC
2401 Pennsylvania Avenue, NW
Suite 300
Washington, DC 20037
(202) 663-7820
dbaker@bakerandmiller.com

Counsel for the International Air Transport Association and Airlines for America

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IN THE

Supreme Court of the United States

STATES OF OHIO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MONTANA, RHODE ISLAND, UTAH AND VERMONT,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, AND AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE MERCHANT ADVISORY GROUP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JAMES A. WILSON*
*Counsel of Record
ROBERT N. WEBNER
KENNETH J. RUBIN
NATHAN L. COLVIN
VORYS SATER SEYMOUR AND PEASE, LLP
52 E. Gay Street
Columbus, OH 43215
(614) 464-5606
jawilson@vorys.com

Counsel for Amicus Curiae The Merchant Advisory Group

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INTEREST OF AMICUS CURIAE[1]

The Merchant Advisory Group ("MAG") was founded in 2008 by a small forward-looking group of merchants dedicated to driving positive changes in the payments field through multi-stakeholder collaboration. Today, MAG represents more than 100 of the largest merchants in the United States. MAG's members employ nearly 11.5 million people and account for nearly $2.6 trillion in annual sales online and at over 430,000 brick and mortar locations across the United States. Of those annual sales, more than half—approximately $1.5 trillion—are conducted via payment cards, representing more than 41 billion individual payment card transactions.

Every year, U.S. merchants collectively pay tens of billions of dollars in payment card transaction fees. MAG's mission is to create an improved and equitable payments ecosystem. Consequently, MAG is a key participant in industry events and ensures that the merchant voice is a part of the dialogue surrounding evolving payments and related matters. MAG also regularly monitors pending cases (like this one) that present legal issues that significantly impact the merchant industry.

MAG's members have a strong interest in the legal standards that protect merchants from the

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[1] All parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus, its members, or its counsel made a monetary contribution intended to fund this brief's preparation or submission.

anticompetitive practices of Respondents American Express Company and American Express Travel Related Services Company, Inc. (collectively, "Amex"). MAG submits this brief to assist the Court in understanding how payments work in the real world in which merchants operate, and to highlight the Second Circuit's failure to recognize the harm that MAG's members and other merchants actually experience as a result of Amex's anticompetitive practices. If the Second Circuit had considered these market realities evidenced in the trial court record—as it should have done under basic antitrust jurisprudence—it would have affirmed the District Court's decision. Instead, the Second Circuit relied on abstract economic theories and papers from outside the record to support Amex's decision to use non-discrimination provisions ("NDPs") to prevent merchants from creating a competitive payment ecosystem. If Amex is successful in exempting its anticompetitive practices from antitrust liability, it will be the merchants, their employees, and American consumers who literally pay the price.

SUMMARY OF ARGUMENT

In *Eastman Kodak Co. v. Image Technical Servs., Inc.*, this Court made clear that antitrust claims should be resolved based on actual market conditions established by the record. *See* 504 U.S. 451, 466-67 (1992). The Second Circuit's decision in this case departs from that precedent in two key respects.

First, in defining the relevant market for antitrust purposes, the Second Circuit declined to follow this Court's oft-expressed guidance that the

market must include those products or services that are "reasonably interchangeable by consumers for the same purposes" and that exhibit "cross-elasticity of demand" between the product itself and substitutes for it. *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 394-95 (1956). Without citation to any precedent, the Second Circuit instead defined the relevant market in this case to include *other* non-interchangeable products and services whose prices *might* be affected by the product and services allegedly restrained. The net result of the Second Circuit's decision is to ignore the actual market realities that affect merchants, by including very different sets of customers, products, and competitors into a single market, without regard to whether the companies or products actually compete with one another. There is no basis in antitrust law for defining a market in such a way.

Second, in assessing whether Amex has market power, the Second Circuit declined to follow this Court's guidance that market power "is the power 'to force a purchaser to do something that he would not do in a competitive market.'" *Kodak*, 504 U.S. at 464 (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 (1984). The District Court reviewed the evidence presented and identified numerous ways in which market realities demonstrate the market power wielded by Amex over merchants. But the Second Circuit did not consider, much less overturn, these factual findings. Instead, it decided that any market power and anticompetitive behavior wielded by Amex against merchants is justified because it *might* result in a savings for Amex cardholders. This sort of balancing of proven, anticompetitive market

realities in one area, with hypothesized favorable market effects in another area, is wholly inappropriate under the Sherman Act. *See United States v. Topco Association, Inc.*, 405 U.S. 596, 609-12 (1972) ("If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision that must be made by Congress and not by private forces or by the courts."). However, even if the Court finds such a balancing appropriate when a two-sided platform is at issue, the traditional Rule of Reason burden-shifting approach to weighing anti-competitive and procompetitive effects—which the District Court followed, and the Second Circuit eschewed—is the appropriate framework to apply.

The Court should reverse the decision below.

ARGUMENT

The Second Circuit's decision reflects the danger of courts relying on abstract economic theory rather than on actual market realities established by evidence presented at trial.

In *Eastman Kodak Co. v. Image Technical Servs., Inc.*, this Court made clear that antitrust claims should be resolved based on real-world market conditions established by the record: "Legal presumptions that rest on formalistic distinctions rather than *actual market realities* are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.'" 504 U.S. 451, 466-67 (1992) (quoting *Maple*

Flooring Manufacturers Assn. v. United States, 268 U.S. 563, 579 (1925)) (emphasis added). *See also United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 208 (1968) ("In interpreting antitrust laws, . . . [w]e must look at the *economic reality* of the relevant transactions.") (emphasis added); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 325-27 (1961) (explaining that the Court has repeatedly explained that it must discern the "practical effect" of contracts under antitrust law).

The District Court respected these admonitions. It held a seven-week trial that included testimony from more than thirty fact and four expert witnesses (resulting in nearly 7,000 transcript pages in testimony) and the acceptance of more than 1,000 exhibits into the record. Pet. App. 72a. The District Court's opinion reflects its careful evaluation of the actual evidence presented, as each of its factual findings is supported by too many citations to the record to count. Pet. App. 63a-293a.

In contrast, the Second Circuit's decision ignores the record (and the District Court's factual findings regarding the same). Instead, the Second Circuit relies almost entirely on academic articles that have not been subjected to cross-examination or the rules of evidence. Pet. App. 1a-54a. In fact, the Second Circuit's decision contains just three citations to the trial record, but more than *29* citations to academic articles—essentially adopting the contents of those articles as unverified and undisclosed expert testimony. Pet. App. 1aa-54a. In particular, the Second Circuit erroneously ignored the market realities established by the record, and experienced

by MAG's members on a daily basis, in favor of abstract economic theory on two critical points discussed below: (1) the relevant market and (2) the existence of Amex's market power.

I. The Second Circuit's Collapse of a Two-Sided Platform Into a Single Market Ignores the Market Reality That Merchants are Distinct Customers of Amex

Amex operates in what is called a "two-sided platform" or "two-sided market" in that it provides distinct services to two different (but interrelated) categories of customers. Pet. App. 70a. On one side, Amex sells the extension of credit and issuance of credit cards to consumers; on the other side, Amex sells card acceptance services to merchants. Pet. App. 70a.[2] Consistent with this Court's prior decisions, the District Court treated each side of this platform as a separate market for purposes of antitrust analysis. The Second Circuit, however, improperly defined the "relevant market" in this case by collapsing both sides of the platform into a single market. This decision is unmoored from this Court's jurisprudence and the everyday market realities experienced by MAG's members.

A. The Realities of the Payment Card Ecosystem

Defining the relevant market in this case requires an understanding of the payment ecosystem for

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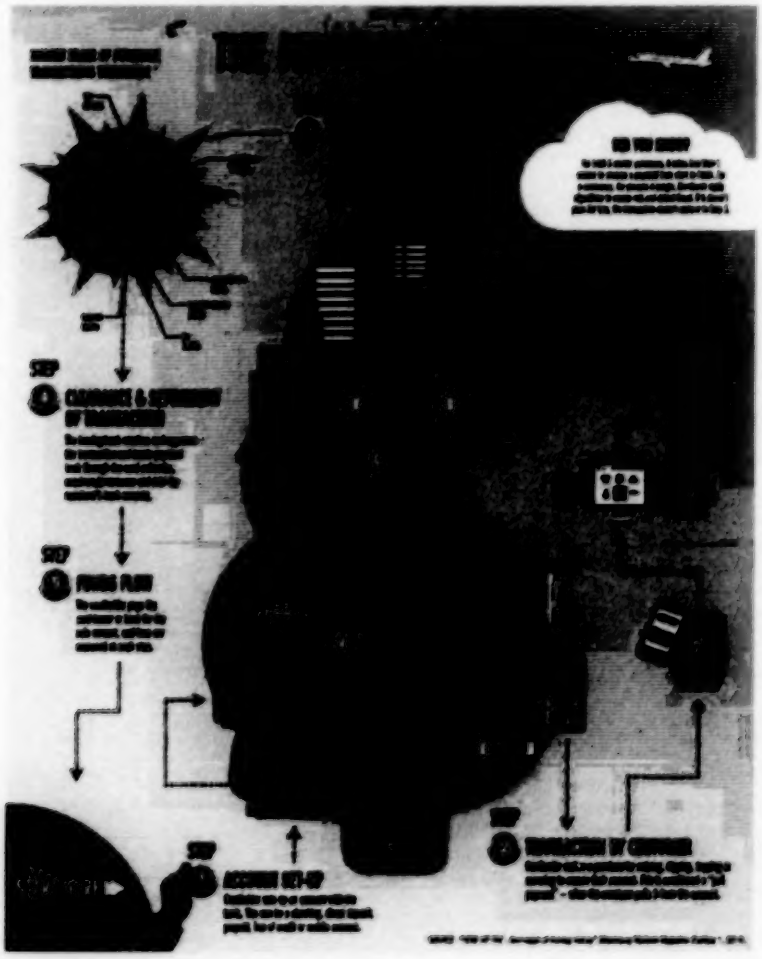
[2] Amex abandoned any argument that debit cards and other alternative payment types should be considered a part of the relevant market for purposes of this case. Pet. App. 5a.

credit cards in the United States, through which trillions of dollars flow on an annual basis. Pet. App. 74a. In 2016 Amex, Visa, MasterCard, and Discover processed more than $3 trillion in purchases. *See* Nilson Rep. Issue 1103 (HSN Consultants Inc., Carpineria, Cal., Feb. 2017). An illustration of the platform can be found at MAG's website:



The Merchant Advisory Group, *Know Your Payments: Transaction Basics*, available at http://www.knowyourpayments.com/transaction-basics/.

On one side of the platform, consumers obtain credit cards by applying for a line of credit from an issuing bank, which in this case is Amex. Pet. App. 75a-76a, 81a-82a. (Visa and MasterCard rely on other actors to serve as the issuing bank for cards that utilize their networks. Pet. App. 75a-76a, 81a-82a.) In turn, these cardholders may then access their line of credit by using the card to make purchases at merchants. Pet. App. 75a-76a.[3]

On the merchant side of the platform, however, a cardholder's card can only be used for payment if the merchant has agreed to accept cards from the network associated with the card (i.e., Amex, Visa, MasterCard or Discover). Pet. App. 75a-83a. If the merchant has agreed to accept the card, it collects cardholder data from the card at the point of sale (i.e., the swipe, dip, tap, or scan of the card), and transmits that data to the acquiring bank, which in this case is also Amex. Pet. App. 82a.-83a.[4] (Unlike Amex, Visa and MasterCard also rely on other actors to serve as acquiring banks to facilitate transactions within their card networks. Pet. App. 81a-82a.)

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[3] *See also* The Merchant Advisory Group, *Know Your Payments: Transaction Basics*, http://www.knowyourpayments.com/transaction-basics/

[4] *See also* The Merchant Advisory Group, *Know Your Payments: Transaction Basics*, http://www.knowyourpayments.com/transaction-basics/

At this point, the acquiring bank effectively has a receivable (the amount owed by the cardholder), and a payment obligation (the amount owed to the merchant), and the acquiring bank discharges the payment obligation by sending payment to the merchant's bank account. Pet. App. 82a-83a. That payment to the merchant, however, is reduced by the fees charged to the merchant by the acquiring bank, the issuing bank, and the network for the "privilege" of accepting the card. This bundle of fees imposed upon merchants is called the "merchant discount fee." Pet. App. 82a-83a.

Merchants pay billions of dollars every year in such fees. In 2014, merchants paid more than $52 billion in merchant discount fees. *See* Nilson Rep. Issue 1041 p. 12 (HSN Consultants Inc., Carpineria, Cal., May 2014). Merchant discount fees represent one of the most significant costs a merchant faces. Pet. 221a-222a. The record in this case bears this out. A witness from Alaska Airlines, for example, testified that merchant discount fees cost the company approximately twice as much as its U.S. labor costs. Pet. App. 222a. And a witness from Ikea testified that merchant discount fees are its fourth highest cost after labor, advertising, and rent. Pet. App. 222a.

Returning to the cardholder side of the platform, the transaction culminates with the issuing bank (again, Amex in this case) invoicing the cardholder for purchases on a monthly basis, and the cardholder paying the issuing bank pursuant to the terms of the agreement between the cardholder and issuer (which

may include additional fees and charges assessed to the cardholder). Pet. App. 75a.-76a.[5]

B. The Second Circuit Ignored Market Realities Experienced by Merchants When it Collapsed the Two-Sided Platform Into a Single Market

1. The Evidence Provided No Basis upon which to Collapse the Two Sides of the Platform into a Single Market

The Second Circuit's decision is detached from the market realities experienced by MAG's members and other merchants as disclosed in the trial record. In every aspect of their businesses—*except for credit card acceptance*—merchants bargain for the goods and services they acquire by seeking more favorable pricing and/or terms. Pet. App. 216a. A merchant might, for example, negotiate a volume discount with a supplier. Pet. App. 216a. Or a merchant could issue a request for proposal to obtain a broad range of solicitations for different quality services or solutions at different prices. Pet. App. 216a.

As demonstrated by the record, however, the competition for merchant payment card acceptance differs from every other segment of a merchant's business—*because there is no competition*. The lack of competition, in turn, eliminates any bargaining power merchants might otherwise have with Amex.

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[5] *See also* The Merchant Advisory Group, *Know Your Payments: Transaction Basics*, http://www.knowyourpayments.com/transaction-basics/

As the evidence presented at trial demonstrated, the card acceptance services side of the platform is highly concentrated. There are just four companies offering such services: Visa has 45% market share, followed by Amex with 26.4%, MasterCard with 23.3%, and Discover with 5.3%. Pet. App. 151a. Further, as acknowledged by the Second Circuit, this independent side of the platform is "characterized by formidable barriers to entry." Pet. App. 17a. And with respect to Amex in particular, its cardholders are highly loyal and insist that merchants accept Amex cards. Pet. App. 156a-165a. Consequently, and as discussed in further detail in the following section, the record in this case establishes that merchants have little choice but to engage Amex's card acceptance services on Amex's terms.

In contrast to the inert and highly concentrated merchant-facing side of the platform—as Amex admitted, the District Court found, and the Second Circuit declined to disturb—the card issuance side of the platform is fragmented and "fiercely" competitive. Pet. App. 233a, 238a. On this side of the platform, Amex's competition is not with Visa and MasterCard, but rather with ***thousands*** of other issuing banks, which include JPMorgan Chase, Bank of America, Citibank, Wells Fargo, HSBC, Discover, Barclays, U.S. Bank, and Capital One among many others. Pet. App. 70a, 84a; *see also* ValuePenguin, *Largest Credit Card Issuers: 2017 Market Share Report*, available at https://www.valuepenguin.com/largest-credit-card-issuers.

The trial record reflects the many ways in which Amex and its thousands of competitors battle for cardholders by attempting to differentiate themselves. For example, the issuing banks offer different incentives to cardholders that can take the form of rewards (e.g., cash back, "points" that can be redeemed for value, frequent flyer miles, statement credits, gift cards, etc.), airport lounge access, purchase protection, rental car insurance, statement credits, and other items. Pet. App. 81a-82a, 89a. Similarly, Amex and its competitors also co-brand their cards with certain merchants (e.g., the Delta SkyMiles Credit Card issued by Amex, or the Marriot Rewards Premier Credit Card issued by Chase Bank) to entice customers with the possibility of earning rewards and benefits from the merchant. Pet. App. 76a, 238a. Card issuers constantly compete to offer the most attractive or innovative rewards package to their customers. *See* Aaron Back, *Competition Over Cards Runs Too Hot*, THE WALL STREET JOURNAL Jan. 26, 2017, at B12 ("Rewards costs are climbing as card issuers scramble to keep up with each other's cash back and travel point offers."). And at a more fundamental level, Amex and its fellow issuing banks must also compete with one another on the prices they charge cardholders for the extension of credit, i.e., the interest rate, annual fees, and float periods charged to cardholders. Pet. App. 81a-82a.

That Amex and its competitor issuing banks fiercely compete is perhaps illustrated no better than by their ubiquitous advertising campaigns for cardholders. Pet. App. 92a. Consider, for example, the card issuers' steady stream of television

commercials or the constant credit card offers that the public encounters on a daily basis through the mail, online, or in print. Potential cardholders are inundated with these advertising campaigns because competition for their business is so fierce.

The sharp contrast between the merchant-facing side of the platform and the cardholder-facing side of the platform—all of which was shown by evidence presented at trial—establishes that the Second Circuit had no basis in the record upon which to collapse the two sides of the platform into a single market. The services offered by Amex on each side of the platform are not interchangeable (and the Second Circuit did not conclude otherwise). And the "commercial realities faced by consumers" on the *card issuance* side of the platform are wholly different from those faced by merchants on the *card acceptance* side of the platform. *Kodak*, 504 U.S. at 482. On one side cardholders have thousands of choices and benefit from fierce competition, while on the other side merchants have few to no choices and face escalating costs instead of competition for their business. The mere fact that cardholders and merchants are both customers of Amex does not make them part of the same market for purposes of antitrust analysis.

In short, the Second Circuit's decision to define the relevant market in this case, in contravention to th.s Court's guidance and the undisturbed factual findings of the District Court, should be reversed. By conflating two different markets, the decision of the Second Circuit protects Amex from having to compete for merchant acceptance—as it should, and

just as it competes vigorously with other card issuers for cardholders. The Second Circuit's decision also strips merchants of the ability to use the tools of competition to reduce their cost of acceptance—tools that merchants successfully use to promote competition, and hold down costs, in every other facet of their businesses. That real-world result is not only unfair to merchants; it is at odds with the basic premise of the Sherman Act.

2. The Second Circuit's Disregard for the Record Led to an Erroneous Reliance on Abstract Economic Theory that Bears Little Similarity to the Reality Merchants Face

This Court has explained that the relevant market for purposes of antitrust analysis must include those products or services that are "reasonably interchangeable by consumers for the same purposes" and that exhibit "cross-elasticity of demand" between the product itself and substitutes for it. *E.I. DuPont*, 351 U.S. at 394-95. Importantly, "market definition . . . can be determined ***only*** after a factual inquiry into the 'commercial realities' faced by consumers." *Kodak*, 504 U.S. at 482 (emphasis added).

Remarkably, the Second Circuit tossed this inquiry aside. It (incorrectly) held instead that the two sides of the platform should be collapsed into one simply because they are interrelated, in that prices or restraints implemented on one side of the platform can affect price and demand on the other side (and vice versa). Pet. App. 39a-40a. Even if this finding

were true and supported by the record, *interrelatedness* is inherent in every two-sided platform. Pet. App. 77a ("In a two-sided platform, a single firm or collection of firms sells different products or services for two separate but interrelated groups of customers who, in turn, rely on the platform to intermediate some sort of interaction between them."). And prior decisions of this Court dealing with such two-sided platforms nevertheless treated each side of the platform as a distinct market for antitrust purposes. *See, e.g. Times-Picayune Publ'g Co. v. United* States, 345 U.S. 594, 610-13 (1953) (distinguishing the market for newspaper advertisers from the market for newspaper readers). The mere interrelatedness of the two sides of the platform is thus no reason to depart from the traditional treatment of two-sided platforms as two distinct markets, and the Second Circuit offered no rationale for why it should.

Indeed, two leading economists have recently explained that there is no economic or legal reason to treat two-sided platforms any differently:

> The two-sidedness of credit card markets does not require a new set of economic principles for assessing competition policy because the difference between the credit card setting and a conventional one-sided market is essentially a matter of labeling. We show that many of the claims about two-sided markets, such as the claim that interchange fees maximize output, are in fact exactly the

> same as the features of one-sided markets with promotion. The reasoning used in Amex to exonerate Amex's use of a no-steering rule and to justify a departure from the usual litigation procedure for evaluation of vertical restrictions in one-sided markets lacks economic foundation. Creating different legal rules for the same economic conduct depending on whether the market can be described as one-sided or two-sided is a mistake that could lead to widespread confusion in the evaluation of vertical restrictions.

Dennis W. Carlton & Ralph A. Winter, *Vertical MFN's and the Credit Card No-surcharge Rule*, at 40 (working paper available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2982115). (Of course, these are not among the economists the Second Circuit decided to credit in lieu of the evidence that was actually presented to the district court at trial.)

What is more, the Second Circuit's decision to collapse the two markets into a single market departs from this Court's guidance on measuring the relevant market. For decades, this Court has made clear that the goal of defining a market is to include those products and services that compete with one another: "Interchangeability of use and cross-elasticity of demand are not to be used to obscure competition but to 'recognize competition where, *in fact*, competition exists.'" *United States v. Cont'l Can Co.*, 378 U.S. 441, 453 (1964) (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 326 (1962))

(emphasis added). The Second Circuit, however, undertook no analysis of whether the products on the two sides of the platform are interchangeable and actually compete.

From the perspective of MAG and its members, card issuing services and card acceptance services plainly are *not* interchangeable. There is simply no set of circumstances under which card issuance services *compete* with card acceptance services. These two services are directed at different potential customers, involve different services, and have different purposes. *See* Phillip Areeda & Herbert Hovenkamp, *Antitrust Law*, (2017 Supp.), ¶ 565, p. 104 (The Second Circuit "incorrectly conclud[ed] that the relevant market . . . was not limited to the market for [card acceptance] services but also included consumers . . . . [T]hose two groupings are not substitutes for one another but rather behave more as complements.").

II. The Existence of Market Power Should Be Determined by Actual Evidence, Not by Abstract Economic Theory

Market power "is the power 'to force a purchaser to do something that he would not do in a competitive market.'" *Kodak*, 504 U.S. at 464 (quoting *Jefferson Parish*, 466 U.S. at 14. Market power can be evidenced by the ability of the defendant to control prices or exclude competition. *Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495, 503 (1969). Alternatively, the existence of such power can be inferred from the possession of a predominant share of the market. *See Jefferson*

Parish, 466 U.S. at 17. In this area, too, the Second Circuit eschewed this Court's precedent and favored ivory tower ruminations over the brick and mortar realities confronted by merchants.

A. The Market for Card Acceptance Services is Highly Concentrated and Features Significant Barriers to Entry

The District Court quite properly found that the market for card acceptance services is highly concentrated and "remarkably static." Pet. App. 154a. As discussed above, there are just four companies in the market. Three of those companies (Visa, Amex, and MasterCard) have collectively captured 94.7% market share, and each has in excess of 23% market share. Pet. App. 151a.

The record in this case regarding the fourth company's efforts to enter the market illustrates the significant barriers to entry that exist. Discover launched in 1985 and, in an attempt to break into the market, offered a number of features that were novel at the time. Pet. App. 154a, 203a-204a. These features included a card featuring no annual fee, the very first rewards component, and pricing network services "very aggressively for merchants." Pet. App. 154a, 203a-204a. Notwithstanding these innovations, in more than three decades Discover has obtained just 5.3% market share on the merchant acceptance side of the market. Pet. App. 151a.

What is more, no other company has made a meaningful attempt to enter the market since

Discover did so in 1985. Pet. App. 165a. This is because there are significant setup costs associated with developing a card network infrastructure and branding to attract customers. Pet. App. 153a-154a. Indeed, as the Second Circuit recognized (and Amex admitted), a potential market entrant would face a classic "chicken and egg problem" wherein "a firm attempting entry into the [payment-card] network market would struggle to convince merchants to join a network without a significant population of cardholders and, in turn, would also struggle to convince cardholders to carry a card associated with a network that is accepted at few merchants." Pet. App. 17a-18a, 154a. Discover was able to survive in large part because it had an advantage not available to other potential market entrants: Discover initially was owned by Sears Roebuck and Company, which marketed Discover cards to its already significant population of private label cardholders. Pet. App. 154a-155a.

And finally, the strength of Amex's market power is exhibited by the fact that Amex admitted that it does not view newer digital payment options (e.g., PayPal or Google Wallet) as a threat to its card acceptance services. Pet. App. 155a. The absence of any competitive threat from these participants in the payments ecosystem only serves to strengthen Amex's market power.

In light of these realities, the District Court was correct to find that Amex's "26.4% share of a highly concentrated market with significant barriers to entry suggests that the firm possesses market power." Pet. App. 155a-156a.

B. The Pernicious Effects of Amex's Restraints on Merchants Demonstrate the Overwhelming Strength of Its Market Power

From the merchant's perspective, the Second Circuit's market power decision also erred in disregarding evidence establishing a multitude of pernicious ways in which Amex's market power affects merchants.

1. In a Competitive Market, Merchants Would Behave Differently

Although the Second Circuit acknowledged Amex's relatively large share of the market, it discounted the strength of Amex's market power by attributing it to cardholder satisfaction. Pet. App. 48a. Put another way, the Second Circuit concluded that Amex's market power is justified because it is derived from cardholders' insistence on utilizing Amex cards to obtain its rewards, even if Amex generates cardholder loyalty by utilizing NDPs that quash competition and inflate prices charged to merchants. Pet. App. 48a. The Second Circuit's analysis is fundamentally wrongheaded, because the notion that a company is permitted to behave anti-competitively in one area, in order to incentivize customers in another area, has been long rejected under antitrust law.

The Sherman Act does not authorize courts to make distinctions between good forms of competition and bad forms of competition, but rather reflects the judgment "that ultimately [all forms of] competition

will produce not only lower prices, but also better goods and services." *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990). The Second Circuit is not authorized to approve of anticompetitive behavior on the merchant side of the platform in exchange for competition on the cardholder side of the platform and thereby substitute its judgment for the results that actual competition would achieve. *See United States v. Topco Association, Inc.*, 405 U.S. 596, 609-12 (1972) ("If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision that must be made by Congress and not by private forces or by the courts.").

Even if the Court were to find that Amex could use the interrelatedness of the two markets to attempt to justify its anticompetitive restraints, the District Court was correct in finding that the traditional Rule of Reason approach is the best course by which to evaluate the market realities of the two markets.

Merchants know, and can be expected to prove, the harm merchants suffer from the types of rules Amex has imposed. However, to conflate the markets on the two sides of the platform as the Second Circuit did, and thereby to require merchants to prove not only the harm to themselves, but to engage in balancing that harm with a purported "benefit" only Amex claims, impermissibly imposes upon merchants the burden of disproving a speculative argument without having the information possessed only by the party engaging in

the anticompetitive conduct. The traditional Rule of Reason framework applied by the District Court requires the party with the best information regarding real market realities to seek to prove the claim or defense. The Second Circuit's novel approach forces merchants to fight unproven speculation as to market power and claimed competitive benefits without even requiring an explanation from the defendant as to those speculative benefits. As the Second Circuit's decision illustrates, such a departure from the well-established Rule of Reason framework is a sure recipe for substituting theoretical economic opinions for actual proof regarding the impact of anticompetitive practices on the real world marketplace.

Moreover, the Second Circuit's focus on whether cardholders benefit from merchants' payment of higher prices—which is a dubious proposition at best, since merchants necessarily must price their goods and services to account for such costs, Pet. App. 220a-221a—ignores the proper measure of market power, which in this case is the ability of Amex to force a merchant to do something "that he would not do in a competitive market." *Kodak*, 504 U.S. at 464. The record reflects that Amex's market power does just that, by forcing merchants like MAG's members to accept Amex when they would otherwise prefer to accept other, much less expensive methods of payment.

Amex's market power is evidenced by its ability to prevent merchants from steering their customers to less expensive forms of payment by forcing

merchants to accept its NDPs. Merchants like MAG's members routinely engage in what is called "steering" in order to influence their customers' purchasing decisions. Pet. App. 67a. For example, merchants might alter the way certain products are placed on a shelf, offer discounts on inventory, or offer "buy one get one free" promotions. Pet. App. 67a. In the credit card space, however, merchants are prohibited from steering customers to a preferred and less expensive card network due to Amex's NDPs. Pet. App. 67a. These NDPs prohibit merchants from doing things like indicating a preference for other payment products or attempting to persuade customers to use a different payment product. Pet. App. 94a-95a.

The record shows that in a competitive market merchants would eliminate or limit the NDPs through negotiation and other competitive tools, like the threat of declining to accept Amex credit cards. Pet. App. 217a-218a. The evidence presented at trial showed, however, that such efforts routinely fail due to Amex's market power. For example, an Amex email explained that United Airlines "insists on [the] right to preference Amex competitors that have lower discount rates and this of course is unacceptable to us." Pet. App. 218a. In fact, out of Amex's nearly 6.4 million merchant customers, only 139 (very large) merchants have successfully negotiated a non-standard NDP that permits *any* steering. Pet. App. 94a-97a. And the nature of the steering permitted by the non-standard NDPs is quite limited—the merchants are only permitted to steer toward co-branded cards (e.g. Southwest Airlines can steer customers to the Southwest

Airlines Rapid Rewards Visa) or in one-off promotions, such as a statement credit for using a certain card. Pet. App. 97a-99a.

If merchants were not forced to accept the NDPs, the record shows that they would engage in steering and other tactics to discourage Amex use unless and until Amex reduced its cost of acceptance. Pet. App. 222a. Such steering could take multiple forms. A merchant could, for example, charge customers the actual cost associated with the form of payment they choose (i.e., the merchant could charge a customer one price for cash, a slightly higher price for debit, a higher price for using Visa or MasterCard, and the highest price for using Amex). Pet. App. 101a-102a, 219a. Merchants could also offer other discounts or perks such as free shipping or additional "rewards points" on the purchases made with a credit card that the merchant agreed to favor. Pet. App. 219a. Or a merchant could simply inform its customers about the costs associated with using one form of payment over another. Pet. App. 101a-102a, 219a. Or, simply, a merchant could put a sign up saying "we prefer that you do not use American Express." Pet. App. 101a-102a. But as things stand, merchants are prohibited from even educating their customers, much less in engaging in any steering, because Amex's market power forces them to accept the NDPs.

2. The Realities of How Cardholders Use Credit and Charge Cards Leaves Merchants With Little Choice But to Accept Amex

The evidence presented at trial correctly showed that merchants like MAG's members have no practical choice in deciding whether to accept Amex, largely due to Amex's highly insistent cardholder base.

The trial record established that Amex's cardholder insistence is largely driven by its lavish rewards programs. Pet. App. 157a-158a. For example, an Amex presentation noted that cardholder loyalty is "[d]riven by [the] ability to earn points, miles, or cash rebates" and that many cardholders "use American Express exclusively to consolidate rewards." Pet. App. 157a. Indeed, some of Amex's card offerings encourage centralized spending or "single-homing" by offering bonuses when a cardholder achieves a given level of spending. For example, a holder of Amex's Platinum Delta SkyMiles Card will achieve bonus frequent flyer miles upon surpassing spending thresholds of $25,000 and $50,000.[6]

Amex has also been able to secure significant cardholder loyalty in the space of company cards issued by corporations to employees for travel and other spending purposes. Pet. App. 157a-158a. In

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[6] *See* https://www.americanexpress.com/us/credit-cards/card/platinum-delta-skymiles/?eep=25330&linknav=US-Acq-CCSG-Cardmember-SideBySideDelta-DeltaPlatinum-ViewCardDetails-Top.

2013, Amex captured 64.3% of this market, and approximately 70% of Amex's corporate card customers mandate their employees to use Amex cards for business expenses. 158a.

Because cardholder insistence dramatically amplifies Amex's existing market power, the reality is that merchants are practically forced by business considerations to accept Amex and its significant price premiums or risk losing sales they otherwise would make to Amex cardholders. Pet. App. 158a-159a. The trial record amply supports the District Court finding in that regard. A witness from Hilton testified, for example, that it would likely lose approximately two-third of its Amex charge volume if it rejected Amex. Pet. App. 158a-159a. A witness from Ikea testified that it explored dropping Amex, but that surveys of its customers indicated that doing so would result in "suffering a loss in sales." Pet. App. 159a And witnesses from Enterprise Rent-A-Car and Sprint Corporation testified that their companies concluded that they could not drop Amex because they would lose too many sales to insistent Amex cardholders, and Amex corporate card holders in particular. Pet. App. 159a.

There are still other concrete, real-world examples of the effect of cardholder loyalty on Amex's market power. In 2004, The Walgreen Company—which was the ninth largest retailer in the country at the time—decided to terminate acceptance of Amex cards due to the costs associated with Amex's 50-basis point premium over Visa and MasterCard acceptance costs. Pet. App. 162a-164a. After doing so, however, Walgreen had to ultimately

reverse course in the face of widespread public outcry from its customers. *Id.* More recently, in 2008, Murphy Oil—a chain of gas stations—ceased accepting Amex cards. Pet. App. 162a-163a. Amex tracked the effects of this decision, and concluded that Murphy Oil's decision was "irrational" because the rate of Amex card insistence among its customers was twice as strong as expected—and in fact Murphy Oil later resumed accepting Amex cards. *Id.*

3. Amex Charges Merchants a Premium When Compared to its Competitors and Price Increases Have Not Caused Loss of Merchant Customers

As the trial record established, Amex carefully tracks cardholder insistence and estimates the incremental volume that brings to merchants who accept Amex. Pet. App. 160a-162a. Because cardholder insistence leaves merchants with little choice but to accept Amex cards, Amex has determined that it can charge merchants a premium price. *Id.* The data in the record shows that, on average, Amex charges merchants significantly more than Visa and MasterCard. In 2013, Amex charged merchants 8 basis points more than Visa, and 3 basis points more than MasterCard. Pet. App. 175a. In certain industries, like travel, that premium is even higher. Pet. App. 176a. While there was some testimony at trial that the difference in cost between Amex and other card brands has eroded over time, the evidence in the record reveals that such erosion is largely attributable to Visa and MasterCard "catching up" to Amex by adopting specific credit card products that carry higher rates that are charged to merchants – higher rates that are

comparable to those charged by Amex. Pet. App. 178a-180a.

Amex's market power is further illustrated by merchant response to Amex's price increases. As the District Court found, Amex enacted at least twenty separate and significant price increases that affected millions of merchants between 2005 and 2010, as part of what Amex euphemistically called "Value Recapture initiatives." Pet. App. 166a-172a. Merchants in certain industries with especially high rates of cardholder insistence bore the brunt of these prices hikes. Airline merchants, for example, experienced a 7%-15% increase in prices between 2007 and 2010, which brought in an additional $90 million in revenue for Amex. Pet. App. 167a. Similarly, Amex targeted hundreds of thousands of merchants in the restaurant industry with a 5-15 basis point increase in the discount rate. Pet. App. 168a.

As the District Court found, these significant price increases resulted in little to no attrition of merchants accepting Amex cards. Pet. App. 168a-169a. In fact, Amex witnesses testified that Amex experienced 100% retention among its largest global merchants, and 99.9% retention among its merchants with annual Amex volume of $3-$100 million. Pet. App. 169a. The net result was an additional $1.3 billion in incremental revenue for Amex between 2006 and 2010. Pet. App. 170a. While not dispositive on its own, the District Court's undisturbed conclusion that Amex can control prices that were already at a premium in this manner

strongly weighs in favor of finding that Amex wields market power. *See Fortner*, 394 U.S. at 503.

4. The NDPs Further Increase Amex's Market Power Over Merchants

The entire premise of the Sherman Act is that competition will yield improvements in allocation of resources, lower prices, and quality. *See N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). As the trial record in this case shows, the NDPs only serve to increase Amex's already significant market power by reducing interbrand competition and preventing merchants from injecting any downward price pressure into the market.

This real-world consequence of the NDPs is best illustrated by Discover's attempts to gain market share by pricing its services "very aggressively for merchants." Pet. App. 203a-204a. Discover ultimately abandoned its competitive pricing model because the NDPs prevented merchants from steering consumers to Discover. Pet. App. 196a-197a. Without steering by merchants, cardholders had no incentive to switch cards, because they could not see or feel the effects of Discover's lower merchant pricing. *Id.* Thwarted in its attempt to compete for market share via increased volume, Discover took a different course and decided to increase its revenue by raising its prices to merchants. Pet. App. 206a ("Recognizing that its lower prices would not drive incremental volume to its network in a market subject to limitations on merchant steering, Discovery abandoned its low-price business model in 2000 and began raising

discount rates in order to more closely align its merchant pricing with that of Visa and MasterCard.").

In fact, Discover's President and CEO testified that the elimination of Amex's anticompetitive NDPs would cause it to once again "aggressively pursue a strategy of lowering [its] prices" for merchants *if* merchants were permitted to steer. Pet. App. 219a. But as things stand, it is Amex's position that there is no reason for it to compete on price. Pet. App. 118a. As one Amex document stated: "We should not compete on costs with [Visa and MasterCard]." *Id.* And the record demonstrates that Amex views the rates charged by Visa and MasterCard as a floor when considering its own merchant discount pricing. *Id.*

As the District Court found (and the Second Circuit did not disturb), Amex and its competitors in the market for merchant acceptance are "largely insulated from the downward pricing pressure ordinarily present in competitive markets" and "the NDPs create a competitive environment in which there is virtually no check on the networks' incentives or ability to charge higher prices to merchants." Pet. App. 197a. In reality, the market for merchant acceptance is not at all true market in which competitors vie for market share by offering lower costs or better services.

* * *

Remarkably, the Second Circuit's analysis of Amex's market power disregarded all of these

findings by the District Court – all of which are fully supported by evidence largely offered by merchants, who must bear the brunt of Amex's anticompetitive depredations. These market realities increase prices, decrease competition, and force merchants to engage in behavior and swallow outlandish costs that they would otherwise avoid in a competitive market. *Kodak*, 504 U.S. at 464. The Second Circuit's decision to disregard these factual findings, and the concrete evidence supporting them, because academics postulate that cardholders ***might*** reap some benefits from this non-competitive market is without basis and should be reversed.

CONCLUSION

For the foregoing reasons, the Court should reverse the Second Circuit's decision and reinstate the injunction issued by the District Court in order to level the playing field in the credit card industry.

Respectfully submitted,

JAMES A. WILSON*
*Counsel of Record
ROBERT N. WEBNER
KENNETH J. RUBIN
NATHAN L. COLVIN
VORYS SATER SEYMOUR AND PEASE, LLP
52 E. Gay Street
Columbus, OH 43215
(614) 464-5606
jawilson@vorys.com

Counsel for Amicus Curiae The Merchant Advisory Group

No. 16-1454

IN THE

Supreme Court of the United States

STATE OF OHIO, et al.,
Petitioners,

v.

AMERICAN EXPRESS COMPANY, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, ALASKA, CALIFORNIA, DELAWARE, HAWAI'I, INDIANA, KENTUCKY, MAINE, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, WASHINGTON, AND WISCONSIN, AND THE DISTRICT OF COLUMBIA, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

ERIC T. SCHNEIDERMAN
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
STEVEN C. WU
Deputy Solicitor General
JUDITH N. VALE
Senior Assistant
Solicitor General
120 Broadway
New York, NY 10271
(212) 416-8020
barbara.underwood@ag.ny.gov
**Counsel of Record*

BEAU W. BUFFIER
Bureau Chief
ELINOR R. HOFFMANN
Deputy Bureau Chief
JEREMY R. KASHA
Assistant Attorney General
Antitrust Bureau

(Additional counsel listed on signature page.)

QUESTION PRESENTED

Section 1 of the Sherman Act prohibits unreasonable restraints of trade. The petitioner States and the United States (together, the "government") allege that respondent American Express Company ("Amex") violated § 1 through anti-steering rules, which prohibit merchants from encouraging Amex cardholders to use different, lower-fee credit cards. Applying the rule of reason, the district court held that the government had proven a prima facie violation by establishing that the anti-steering rules imposed anticompetitive effects (such as a price increase) on merchants. On appeal, the Second Circuit reversed, holding that to prove a prima facie violation the government had to show not only anticompetitive effects on the merchant side but also insufficient procompetitive benefits on the cardholder side. The question presented is:

> Under the rule of reason, did the district court's finding that Amex's anti-steering provisions stifled price competition on the merchant side of Amex's credit-card platform suffice to prove anticompetitive effects and thereby shift to Amex the burden of establishing any procompetitive benefits from the anti-steering rules?

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INTEREST OF AMICI CURIAE

This appeal raises important legal questions about how to apply the rule of reason to alleged anticompetitive conduct involving a "two-sided" platform—i.e., an intermediary that brings together two distinct groups of its customers to interact with each other. Amici States of New York, Alaska, California, Delaware, Hawai'i, Indiana, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, New Mexico, North Carolina, Oregon, Pennsylvania, South Carolina, Washington, Wisconsin, and the District of Columbia have a direct interest in ensuring that they may continue to effectively enforce antitrust laws to preserve vigorous competition in industries that may involve two-sided (or multisided) platforms.

The States have been increasingly active in enforcing the antitrust laws in sectors that may involve two-sided platforms, which have become more common with the rise of computer technology and the internet. For example, New York, Florida, Massachusetts, Ohio, Pennsylvania, and the District of Columbia entered into a settlement with the National Football League resolving antitrust claims arising from the NFL's policy of requiring all teams to impose a price floor on secondary tickets sold over NFL-sanctioned ticket-exchange websites—two-sided platforms that unite ticket buyers with ticket owners who want to resell their tickets.[1] And New York recently

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[1] N.Y. Att'y Gen., Press Release, A.G. Schneiderman Announces Multi-State Settlement with NFL Permanently Barring League-Wide Mandatory Ticket Price Floor (Nov. 15, 2016) (internet). (For sources available on the internet, URLs are listed in the table of authorities.)

entered into a settlement with Simon Property Group, the operator of an outlet center that connects retailers and shoppers, to prohibit Simon from using its contracts to restrict retailers from opening a nearby store—an anticompetitive restraint that thwarted the development of competing outlet stores.[2]

Amici States recognize that the economics of two-sided platforms may differ from the economics of traditional buyer-seller relationships, and that such economic differences should be properly taken into account in any application of traditional antitrust principles. But the court of appeals erred here in its approach to two-sided platforms, distorting bedrock antitrust law based on the mistaken belief that it was required to do so to account for the interdependent nature of the two sides of the platform at issue—a credit-card network that connects merchants and cardholders. First, the court of appeals erroneously defined the relevant market as the entire platform, combining into a single market the services Amex sells to merchants and the services Amex sells to cardholders—even though the well-established law on market definition would deem these two types of services to be in separate markets. Second, the court of appeals incorrectly required the government to demonstrate a net anticompetitive effect across the entire platform at the prima facie stage, rather than an anticompetitive effect (such as a price increase) on just one side of the platform.

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[2] N.Y. Att'y Gen., Press Release, A.G. Schneiderman Announces Settlement with Nation's Largest Mall Operator To Stop Anticompetitive Tactics at Woodbury Common Outlet Center (Aug. 21, 2017) (internet).

These holdings threaten to undermine amici States' antitrust enforcement efforts by placing an unwarranted burden on plaintiffs seeking to challenge unreasonable restraints in industries that may involve two-sided platforms, such as the credit-card industry. Contrary to the court of appeals' reasoning below, well-established antitrust doctrines involving market definition and burden shifting fully account for the distinct economics of two-sided platforms and the different ways in which firms operating two-sided (or multisided) platforms may compete. The amici States have a substantial interest in establishing the correct principles for analyzing unreasonable restraints of trade, in order to prevent disruption to their antitrust enforcement efforts.

STATEMENT

In this antitrust enforcement action, the United States and several States (together, the "government") alleged that respondents American Express Company and American Express Travel Related Services Company ("Amex") violated federal antitrust law by contractually barring merchants that accept Amex credit cards from encouraging their customers to use a different credit card that is less expensive for the merchants to accept. After a bench trial, the United States District Court for the Eastern District of New York (Garaufis, J.) held Amex liable for unreasonably restraining trade in violation of § 1 of the Sherman Act. On appeal, the United States Court of Appeals for the Second Circuit reversed and entered judgment for Amex.

A. Two-Sided Platforms

By connecting merchants and cardholders to complete financial transactions, Amex operates a business that economists call a "two-sided platform." *See* Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report* ("*Progress Report*"), 37 RAND J. of Econ. 645, 645-46 (2006).[3] Although many firms act as intermediaries between other businesses and customers, a distinct feature of two-sided platforms is that they connect two different groups of the firm's own customers and facilitate an interaction between them. *See* Delegation of the U.S. to the Competition Committee, *Roundtable on Two-Sided Markets: Note by the Delegation of the United States* ("U.S. Roundtable Note"), at 2, OECD No. DAF/COMP/WD(2009)68 (2009).

The manner in which the two sides of a platform interact may depend on the specific customer groups and businesses involved in each platform. But many two-sided platforms share certain common features. In particular, although the two groups of customers often purchase different products at different prices from the firm operating the platform, the value that each customer group derives from the platform may depend on the other group's usage of the platform. *See id.*; *see also Progress Report*, *supra*, at 645-67. With respect to credit-card platforms, for example, a credit card is more valuable to a retail customer when more merchants accept that card at their stores. In turn, a credit-card network is more valuable to merchants

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[3] *See also* Marc Rysman, *The Economics of Two-Sided Markets*, 23 J. of Econ. Perspectives 125 (2009); Mark Armstrong, *Competition in Two-Sided Markets*, 37 RAND J. of Econ. 669 (2006).

when more retail customers use that card to make purchases. *See* U.S. Roundtable Note, *supra*, at 2.

When the value that each customer group derives from a two-sided platform is interconnected in this manner, the company operating the platform may need to obtain and retain sufficient numbers of customers on each side of the platform to ensure that the platform functions effectively. Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. Eur. Econ. Ass'n 990, 990 (2003). For example, if too few merchants accept a credit-card company's card, consumers would likely have little incentive to use that card. And if hardly any consumers use a specific credit card, merchants would likely have little incentive to accept that card brand. To solve this problem, where one group of customers is more difficult to attract than the other group, the platform may structure its pricing to account for this difference. U.S. Roundtable Note, *supra*, at 2-3. For example, a shopping mall charges retailers rent to access the mall but likely allows shoppers to enter without charge. Credit-card companies have likewise long charged merchants higher prices for using credit-card services than are charged to cardholders, who may pay an annual card fee but usually pay no transaction fees and may even pay negative prices if they receive rewards from using a card. *See id.* at 3. Pricing thus may look "unusual in two-sided markets" because pricing on "one side of the market depends not only on the demand and costs that those consumers bring but also on how their participation affects participation" and pricing on the other side of the platform. Rysman, *supra*, at 129. Moreover, pricing is not the only competitive factor that may differ in two-sided markets because strategies for "innovation,

advertising, and quality investment can also take on added dimensions in a two-sided market." *Id.* at 135.

B. The Government's Antitrust Complaint Against Amex

In this case, the government alleges that Amex illegally stifled competition on the merchant side of its credit-card platform—also known as the "network-services market" or the "merchant-services market." The government challenged Amex's "anti-steering rules," which are private contractual provisions that bar merchants that accept Amex cards from encouraging their customers to use a different credit card. (Pet. App. 66a-68a.) Amex's anti-steering rules thus prohibit a merchant from indicating that it prefers another credit card or from offering consumers an incentive (such as a price discount) to use a different credit card. For example, the rules preclude a merchant from telling a customer that it "prefers Visa"; providing a discount to customers who use Discover cards; or posting a sign displaying the fees it pays to use each credit-card network. (Pet. App. 95a-96a, 100a.) Absent the anti-steering rules, a merchant might want to encourage its customers to use a non-Amex card brand because Amex often charges merchants higher fees than other credit-card companies charge. (Pet. App. 68a.)

The government alleged that the anti-steering rules caused actual anticompetitive effects in the merchant-services market by essentially eliminating the credit-card companies' incentives to compete for merchants. (*See* Pet. App. 68a.) For example, the government alleged that the anti-steering rules had raised merchant fees above competitive levels, prevented credit-card companies from offering lower

merchant fees, and stifled innovation. (*See* Pet. App. 196a-197a, 203a, 212a-214a.)

C. The District Court's Opinion

Amex's anti-steering rules are a form of restraint that is analyzed for antitrust purposes under the rule of reason. Courts follow a four-step burden-shifting framework to apply the rule of reason. First, the plaintiff has the initial burden to make a prima facie showing that the challenged restraint is anticompetitive in the relevant market.[4] *See National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.* ("*NCAA*"), 468 U.S. 85, 104-13 (1984). Second, if the plaintiff carries its burden, the burden shifts to the defendant to establish a procompetitive justification for the restraint in the relevant market. *See id.* at 113; *California Dental Ass'n v. FTC*, 526 U.S. 756, 788 (1999) (Breyer, J. concurring in part & dissenting in part). Third, where the defendant satisfies its burden, the plaintiff may show that the defendant's procompetitive benefits could have been achieved through less restrictive means, i.e., actions that are less damaging to competition. Fourth, if no less-restrictive alternatives exist, the plaintiff bears the burden of demonstrating that the anticompetitive harms outweigh the procompetitive gains. *See* 7 Phillip E.

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[4] As an alternative to establishing directly that a restraint caused actual anticompetitive effects, a plaintiff may prove anticompetitive effects indirectly by establishing that the defendant imposed a restraint and possessed sufficient market power to impair competition. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986); *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 509 (2d Cir. 2004). This market-power route to establishing anticompetitive effects is not at issue here. See *infra* at 9 n.5.

Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* 430 (3d ed. 2010) (describing framework's four steps). Applying this framework here, the district court determined after a seven-week bench trial that the anti-steering rules violate § 1 of the Sherman Act. (Pet. App. 66a-72a.)

Market Definition: The court first determined that the relevant market was the market for merchant "network services"—i.e., the services that enable merchants to process credit-card payments. The court rejected Amex's argument that the relevant market should be a market for credit-card "transactions," which would include not only merchant services but also the distinct services that Amex provides to cardholders—such as the provision of credit and cardholder rewards for using an Amex card. The court explained that merchant services and cardholder services are not interchangeable, and thus could not be collapsed into a single, platform-wide market under traditional antitrust doctrines. (Pet. App. 113a-121a.)

The court emphasized that limiting the relevant market to include only merchant services would not require the court to ignore entirely the cardholder side of the platform. Rather, the court explained that because the merchant and cardholder sides of the platform are "inextricably linked" (Pet. App. 118a), the court would consider "the two-sided features" of the platform as part of the rule of reason analysis (Pet. App. 121a).

Anticompetitive Effects: The district court next concluded that the government had satisfied its prima facie burden of showing that Amex's anti-steering rules had caused actual anticompetitive effects in the

market for merchant services.[5] Specifically, the court concluded that the rules had increased prices to merchants above competitive levels, blocked other firms from using a lower-fee business model, and stifled innovation. (Pet. App. 203a-214a.)

The court determined that the anti-steering rules caused these anticompetitive effects by exploiting interconnections between the merchant and cardholder sides of the network. As the court explained, the rules prohibited merchants from responding to increases in Amex's fees by encouraging customers to use lower-fee cards. (Pet. App. 194a-197a.) The rules did so by controlling merchants' interactions with customers at the "point of sale"—the critical moment when the merchant side and cardholder side of the platform meet to complete a credit-card transaction. (Pet. App. 195a.) At that moment, the merchant's decision to use a particular credit-card company's services—and thus to pay that company's per-transaction fee—is effectively controlled by the customer's decision to use a specific card. The court determined that prohibiting merchants from steering customers to use lower-fee cards deprived the merchants of "any meaningful ability" to switch their own use of network services in response to lower fees offered by a particular card network. (Pet. App. 196a.) As a result, the district court found that the anti-steering rules impeded horizontal competition among the credit-card networks because the networks lacked

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[5] In the alternative, the district court held that the government had satisfied its prima facie burden by demonstrating that Amex possessed sufficient market power to cause anticompetitive effects. (Pet. App. 148a-191a). This market power finding was reversed by the Second Circuit and is no longer at issue.

any incentive to offer merchants lower fees. (Pet. App. 194a-197a, 202a-203a.)

Procompetitive Effects: Because the government had established actual anticompetitive effects, the district court shifted the burden to Amex to demonstrate that its anti-steering rules had procompetitive effects in the merchant-services market. (Pet. App. 228a.) Among other arguments, Amex asserted two primary procompetitive justifications. First, Amex argued that the anti-steering rules allowed Amex to compete against other credit-card networks for *cardholders'* business. Amex contended that the anti-steering rules protected its ability to impose higher fees on merchants, and that those fees in turn funded robust cardholder rewards and other benefits that allowed Amex to compete with the larger credit-card networks (MasterCard and Visa) for cardholders. (*See* Pet. App. 229a-234a; Defs.' Post-Trial Br. ("Defs. Br.") 3-4, 21-25, *United States v. American Express Co.*, No. 10-cv-4496 (E.D.N.Y.), ECF No. 605; Defs.' Proposed Findings of Fact & Conclusions of Law ("Defs. Proposed Findings") 29-36, *American Express*, No. 10-cv-4496, ECF No. 612.)

Second, Amex asserted that the anti-steering rules allowed Amex to offer significant value, not only to cardholders, but also to merchants. Amex argued that its cardholder rewards program and other cardholder benefits allowed merchants to gain access to high-spending Amex customers. (*See* Defs. Proposed Findings, *supra*, at 36-40.) Amex further argued that, absent the anti-steering rules, merchants could free-ride on the benefits of Amex's investments in cardholder rewards while avoiding the higher merchant fees needed to fund those programs. (*See* Pet. App. 255a-256a; Defs. Br., *supra*, at 25-26.)

In analyzing both of these arguments, the district court questioned whether it could consider the anti-steering rules' purported procompetitive impacts on the market for cardholder services at all. The court noted that procompetitive effects in one market cannot be used to offset anticompetitive effects in a separate, interrelated market—here, the market for merchant services. (Pet. App. 238a-241a.)

The court nonetheless concluded that, even if such "cross-market balancing is appropriate" (Pet. App. 239a), the anti-steering rules were not reasonably necessary to achieve the procompetitive effects that Amex had raised (Pet. App. 239a-240a). The court found that Amex's business model was unlikely to collapse if the anti-steering rules were removed because merchants and cardholders would still want to use Amex's services if Amex truly delivered services superior to those of other credit-card networks. (Pet. App. 242a-245a.) The court also determined that the rules were not needed to prevent free-riding because rational cardholders would continue to use their Amex cards so long as the rewards offered by Amex were greater than any benefits provided by merchants for using a different card. (Pet. App. 257a.) The court concluded that even without the rules, Amex would thus continue to have an incentive to invest in its cardholder rewards program. (Pet. App. 257a.) Finally, the court determined that even if the anti-steering rules were necessary to achieve some procompetitive effects, any such procompetitive gains did not "offset, much less overcome," the rules' anticompetitive effects on the network-services market. (Pet. App. 229a; *see also* Pet. App. 239a-240a.)

D. The Second Circuit's Opinion

On appeal, the Second Circuit reversed and directed the district court to enter judgment in favor of Amex. (Pet. App. 4a.) Two holdings by the Second Circuit are relevant here.

First, the Second Circuit held that the district court had improperly defined the relevant market by excluding the customer side of Amex's two-sided platform. The Second Circuit determined that the proper market was the entire platform, including both cardholders and merchants (Pet. App. 50a), because concluding otherwise would improperly ignore "the two markets' interdependence" and the anti-steering rules' impacts on the cardholder side (Pet. App. 34a-35a.)

Second, the Second Circuit concluded that the government had failed to carry its prima facie burden of establishing that Amex's anti-steering rules caused actual anticompetitive effects in the platform-wide market it had defined. The court held that the government was required to prove a net anticompetitive harm across the entire platform—for example, by demonstrating that the anti-steering rules caused Amex to charge a supracompetitive "net price" to merchants and cardholders (Pet. App. 49a); reduced output by lowering the number of credit-card transactions; or reduced the net quality of services Amex provides to merchants and cardholders (Pet. App. 51a-52a).

The court determined that the government had failed to establish any such platform-wide net anticompetitive harm, and that the burden to prove procompetitive effects had thus never shifted to Amex. While the court did not question the district court's

finding that the anti-steering rules had increased prices *for merchants*, the court found that the government had failed to demonstrate a higher "net price" that took into account the benefits that Amex provided to cardholders. (Pet. App. 49a; *see* Pet. App. 53a.) The court thus faulted the district court for improperly focusing "on the interests of merchants while discounting the interests of cardholders." (Pet. App. 54a.) The court further reasoned that the government had failed to satisfy its prima facie burden, notwithstanding the price increase for merchants, because the overall number of credit-card transactions had increased rather than decreased, and because Amex had improved the quality of its cardholder services. (Pet. App. 52a-53a.)

SUMMARY OF ARGUMENT

Two-sided platforms present unique features that courts may appropriately consider in applying established antitrust doctrines. But the court of appeals here committed two critical legal errors in applying antitrust principles to Amex's two-sided credit-card platform. The court of appeals incorrectly concluded (1) that the relevant market must be defined as the entire platform, rather than as separate markets for merchant services and cardholder services; and (2) that at the prima facie stage, the government must establish a net anticompetitive effect that harms both merchants and cardholders, rather than an anticompetitive effect (such as a price increase) on only the merchant side of the platform.[6]

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[6] As explained *supra* at 7 n.4, as an alternative to direct proof of an actual anticompetitive effect, an antitrust plaintiff may

The Second Circuit distorted bedrock antitrust principles to reach both of these conclusions, based on the unfounded concern that it was required to do so to account for interdependencies between the merchant and cardholder sides of Amex's platform. But long-standing antitrust doctrines already ensure that courts may properly consider interdependencies between the two sides of a platform. The Second Circuit's novel and disruptive approaches to two-sided platforms are unnecessary and threaten to undermine valid antitrust enforcement.

I. This Court has long defined the relevant market for antitrust purposes as including only products that are reasonably interchangeable for each other. The court of appeals failed to apply this controlling principle here when it combined into a single market the services that Amex sells to merchants and the services Amex sells to cardholders. These two types of services are not interchangeable because a merchant that buys Amex's merchant services cannot switch to purchasing Amex's cardholder services in response to Amex increasing merchant fees.

The Second Circuit mistakenly defined the market as the entire platform based on the concern that separating the markets for merchant services and cardholder services would improperly ignore interconnections between these two sides of Amex's platform. But defining the relevant market as the market for merchant services would not preclude consideration of

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satisfy its prima facie burden by demonstrating that a defendant has imposed a restraint of trade and possesses sufficient market power to suppress competition in a properly defined market affected by the restraint. This independent route to establishing anticompetitive effects is not at issue here.

the anti-steering rules' impacts on the cardholder side of the platform, as the court of appeals reasoned. Rather, under a proper market definition, the court would be able to consider the anti-steering rules' impacts on the cardholder side to the extent that such impacts affect competition on the merchant side. Such an inquiry both accords with long-standing antitrust analysis and ensures that the competitive realities of a two-sided platform are fully addressed.

Defining the relevant market as including only merchant services also protects against another error in the Second Circuit's reasoning, namely, the suggestion that *any* benefit on one side of a platform will always be relevant to evaluating the reasonableness of a restraint on the other side of the platform—irrespective of whether the benefit actually affected competition on the side of the platform at issue. Such a blanket rule does not comport with the rule of reason's fact-intensive inquiry into a restraint's competitive effects in the *relevant* market. Because different industries may involve different types of two-sided (or multisided) platforms, the procompetitive significance of an out-of-market benefit on the relevant side of a platform will vary depending on the particular platform and restraint at issue. The antitrust inquiry should thus remain focused on whether, under the facts of each case, a procompetitive effect on one side of a platform affects competition in the relevant market on the other side of the platform.

II. The court of appeals' incorrect definition of the market as including both merchant and cardholder services caused the court to conclude that the government's prima facie burden to establish an anticompetitive effect required showing that the anti-steering rules imposed a *net* anticompetitive harm to

both merchants and cardholders. But the established burden-shifting framework applied under the rule of reason provides that where the government establishes an anticompetitive effect, the burden shifts to the *defendant* to show potential procompetitive effects from its restraint. The Second Circuit's "net harm" approach drastically distorts this framework by requiring the government, at the prima facie stage, to predict and disprove any potential procompetitive effects.

The burden-shifting framework was developed to avoid placing precisely such an undue burden on antitrust plaintiffs. Because a defendant possesses in-depth knowledge about its own industry and motivations for implementing a restraint, the burden should remain with the defendant to demonstrate procompetitive effects from its conduct. And contrary to the Second Circuit's concern, maintaining a proper allocation of burdens will not chill potentially procompetitive conduct in industries involving two-sided platforms. The burden-shifting framework already protects such conduct by providing a defendant with a full and fair opportunity to establish that its conduct causes procompetitive effects on the side of the platform at issue.

ARGUMENT

I. The Traditional "Reasonable Interchangeability" Rule for Market Definition Applies to Two-Sided Platforms.

A. The Services That Amex Sells to Merchants Are a Separate Market from the Services It Sells to Cardholders.

For more than fifty years, this Court, legal scholars, and economists have defined the relevant market for antitrust purposes as including only products that are reasonably interchangeable with the product over which the defendant is alleged to have exercised an illegal restraint of trade. *See, e.g., United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956); *see also United States v. Grinnell Corp.*, 384 U.S. 563, 571-72 (1966); 2B Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* 235-38, 389-93 (4th ed. 2014). This "reasonable interchangeability" rule, *E.I. du Pont*, 351 U.S. at 404, properly identifies the range of products that consumers can buy from other firms instead of the defendant's product in response to defendant's conduct. The relevant market has long been defined in this way because reasonably interchangeable products constrain the defendant's ability to engage in anticompetitive conduct: purchasers will simply buy another product rather than continue to purchase the defendant's product subject to defendant's anticompetitive restraint. *See United States v. Microsoft*, 253 F.3d 34, 51-52 (D.C. Cir. 2001) (en banc) (per curiam); Areeda, Hovenkamp & Solow, *supra*, at 266-67.

Applying this bedrock principle of market definition here, the services that Amex sells to merchants and the services that Amex sells to cardholders are in separate antitrust markets because the two types of services are not interchangeable. As the petitioner States and the United States aptly explain, merchants that purchase Amex's merchant services cannot switch to buying Amex's cardholder services—such as the extension of credit and provision of rewards for using an Amex card—in response to Amex increasing its merchant fees. *See* Br. for the Pet'rs & Resp'ts Nebraska, Tennessee, and Texas 53-55; Br. for the United States 35-37. Likewise, a cardholder unhappy with an increase in the interest rate charged by Amex cannot switch to purchasing network services. Accordingly, merchant services "constitute a distinct market, separate from the market for" cardholder services. *See United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 239 (2d Cir. 2003); *see also* Renata B. Hesse & Joshua H. Soven, *Defining Relevant Product Markets in Electronic Payment Network Antitrust Cases*, 73 Antitrust L.J. 709, 726-27 (2006) (credit-card network may be able to exercise market power over only one side of two-sided platform).

B. Limiting the Relevant Market to One Side of a Platform Does Not Preclude Consideration of Impacts on the Other Side of the Platform.

The Second Circuit violated the well-established principles of market definition by collapsing the market for merchant services and the market for cardholder services into a single platform-wide market for credit-card transactions. The court applied this novel platform-wide approach based on a

concern that dividing the two sides of Amex's network into separate markets would improperly ignore interdependencies between the merchant and cardholder sides of the platform. (*See* Pet. App. 34a-35a, 39a-40a, 49a.)

The court's concern was unfounded. Separating the merchant and cardholder sides of Amex's network into distinct markets would not preclude *all* consideration of the anti-steering rules' competitive impacts on the cardholder side. To the contrary, courts applying the rule of reason may consider evidence about a restraint's impacts outside of the market in question when such impacts affect competition in the relevant market. Applying the traditional doctrine of market definition thus does not preclude the factual inquiry into cardholder benefits discussed by the court of appeals here. By contrast, the court of appeals' merger of the distinct merchant- and cardholder-services markets improperly constrains such a factual inquiry by mistakenly presuming that *any* cardholder benefit caused by Amex's anti-steering rules would be relevant to justifying the higher prices that those rules inflict on merchants—irrespective of the nature or strength of the interconnections between the two sides of the platform.

The appropriate way for this Court to resolve these competing concerns is to hold that (a) the relevant market is limited to merchant-side services, and (b) courts may look to the anti-steering rules' effects on the cardholder-services market, but only to the extent that cardholder benefits affect competition in the relevant market for merchant services. In this way, the market definition respects the "commercial realities" of two-sided platforms, *see Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 482 (1992),

by permitting a factual inquiry into the related cardholder-services market, while limiting any such inquiry to only the relevant aspects of that separate market.

1. When the relevant market is one side of the platform, a court may consider the competitive effects on that market caused by a restraint's effects on the other side of the platform.

Allowing a court to consider arguments that an alleged restraint's impact on one side of a two-sided platform affects competition in the relevant market on the other side of the platform accords with established antitrust principles and long-standing practice. The touchstone of the rule of reason is the competitive effect of the challenged restraint and whether it suppresses or promotes competition. *See National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978); *see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) ("In its design and function the rule [of reason] distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."). This analysis has long encompassed consideration of a wide variety of factors—such as historical conditions, applicable regulations, and other "facts peculiar to the business"—that illuminate whether the defendant's conduct has anticompetitive or procompetitive effects in the relevant market. *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918). Competitive effects or legitimate justifications that arise in a separate but closely

interrelated market may likewise be considered, so long as they cause competitive effects in the *market at issue*.

Courts are familiar with considering the ways in which a defendant's conduct affects competition in the relevant market through interconnections between that market and a distinct but related market. For example, in *Microsoft Corp.*, several States and the United States proved at trial that Microsoft unlawfully maintained its monopoly in the market for Intel-compatible computer operating systems ("operating-system market") through, among other things, anticompetitive actions in the separate but inter-related market for internet browser software. *See* 253 F.3d at 47. In reaching this conclusion, the D.C. Circuit rejected Microsoft's argument that its actions in the browser market were irrelevant because there were separate markets for browsers and operating systems. *See id.* at 53-54, 78-79. Notwithstanding the separate markets, the court determined that inherent interconnections between these markets allowed Microsoft to maintain its monopoly in the operating-system market through actions it took in the browser market—specifically, Microsoft had suppressed usage of other companies' browsers and thereby prevented development of competing software applications that would have increased competition in the operating-system market. *Id.* at 60-62. Microsoft's browser-related conduct thus contributed to its anticompetitive monopolization of the operating-system market.

The parties in this proceeding presented similar evidence below about the feedback loop between the cardholder impacts of Amex's anti-steering rules and competition on the merchant market at issue here. For example, the government argued that the anti-steering

rules prevented consumers from obtaining (or even perceiving) any benefit from the lower-cost credit cards offered by Amex's competitors, and thus restrained price competition in the merchant-services market by eliminating any incentive for the credit-card networks to compete to offer lower merchant fees. (*See* Pls. Post-Trial Mem. 1, 5-7, 9, 11, 14-15, *American Express*, No. 10-cv-4496, ECF No. 606; *see also* Pet. App. 191a-198a.) Amex, in turn, argued that the anti-steering rules permitted it to offer robust benefits to cardholders that encouraged them to spend more money at the merchants' businesses—thus improving competition in the merchant-services market. (*See* Pet. App. 86a-88a; *see also* Defs. Br., *supra*, at 23-25; Defs. Proposed Findings, *supra*, at 226-33, 241-48.)

Adhering to traditional principles of market definition thus fully permits courts to consider whether a restraint's impact on one side of a platform causes actual and direct competitive effects in the relevant market on the other side of a platform. As the record shows, such evidence may both support and undermine a plaintiff's claim of an unreasonable restraint on competition in the relevant market. The court of appeals thus had no basis to reject traditional market-definition principles here.

2. Courts should not consider a restraint's asserted benefit on the other side of a platform unless it causes a procompetitive effect in the market at issue.

The Second Circuit's erroneous market definition led it to believe that *any* procompetitive benefit on the cardholder side could be considered in the competitive-effects analysis—irrespective of whether the benefit

had an effect on competition in the relevant merchant-services market. (*See* Pet. App. 51a (criticizing government for failing to consider anti-steering rules' effects on "*all* Amex consumers on both sides of the platform"); Pet. App. 54a (criticizing district court for "discounting the interests of cardholders").) Amex likewise argued below that its anti-steering rules could be justified solely by their alleged procompetitive effects on the cardholder side of the platform. See *supra* at 10.

Such reasoning expands too far the scope of potential procompetitive justifications relevant to analyzing a two-sided platform under the rule of reason. As this Court has explained, the rule of reason "does not open the field of antitrust inquiry to *any* argument in favor of a challenged restraint." *National Soc'y of Prof'l Eng'rs*, 435 U.S. at 688 (emphasis added). In particular, a defendant may not simply point to some perceived benefit in a separate market to justify its anticompetitive actions in the market in question. *See United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 330 (S.D.N.Y. 2001) (vigorous competition "to offer lower interests rates" and incentive programs to cardholders could not be used to offset "reduced price competition in the network services market"). Rather, the rule of reason "focuses directly on the challenged restraint's impact on competitive conditions" in the relevant market. *National Soc'y of Prof'l Eng'rs*, 435 U.S. at 688.

To be sure, two-sided platforms that exhibit close interconnections between the groups on either side of the platform would ordinarily aid a party's attempt to establish how impacts on one side of a platform affect competition on the other side. But because not all two-sided platforms are alike, the strength and importance

of "the network interactions between the two sides" of a platform will vary depending on the platform and market participants, as well as the specific restraint at issue. U.S. Roundtable Note, *supra*, at 3; *see* Dennis W. Carlton & Alan S. Frankel, *Transaction Costs, Externalities, and "Two-Sided" Payment Markets*, 2005 Colum. Bus. L. Rev. 617, 630 (2005). Establishing the relevant connection is thus a fact-intensive inquiry that will turn on the particular features of the platform and restraint in question—features that are likely to differ from platform to platform and restraint to restraint.

For example, platforms that are used to complete financial transactions between two customer groups ("transactional platforms") differ significantly from other types of platforms. Transactional platforms—such as the credit-card payment platform at issue here—often exhibit strong, two-way interconnections between each side's use of the platform. *See* Lapo Filistrucchi, Damien Geradin & Eric van Damme, *Identifying Two-Sided Markets* 4 (Tilburg Univ., TILEC Discussion Paper No. 2012-008 2012) (internet).

In other cases, however, the interactions between the two sides of a platform "may be insignificant or may not be relevant for a particular antitrust issue" or a particular restraint. U.S. Roundtable Note, *supra*, at 3. For example, a newspaper is generally considered to be a two-sided platform that unites readers and advertisers. *See* Rysman, *supra*, at 128; *see Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 610 (1953). But a transaction between a reader and an advertiser does not occur each time that a reader purchases a newspaper or an advertiser buys advertising space. And while an advertiser likely wants to purchase more advertising from a newspaper that has

more readers, a reader does not necessarily want to purchase a newspaper because it has more advertisers—in fact, a reader might prefer a newspaper with fewer advertisers. *See* Filistrucchi et al., *supra*, at 4. As a result, although advertising revenue may allow the newspaper to charge a lower price to readers, the interdependencies between the two groups are more attenuated than in a transactional platform. *See id.* at 6-7.

An approach to two-sided platforms that too broadly allows a restraint's procompetitive effects on one side of the platform to justify its anticompetitive effects in the relevant market on the other side of the platform would improperly ignore such critical differences between platforms. Such an approach would also undermine proper enforcement in cases involving two-sided platforms or similarly complex industries. If the universe of relevant procompetitive factors is not limited to factors that are proven to have procompetitive effects in the relevant market, defendants could easily justify misconduct that stifles competition in one market by pointing to purported procompetitive effects in some other market—so long as they could plausibly claim that the two markets are connected in some way. Such an expansive view of the relevant procompetitive justifications would improperly allow defendants to "sacrifice competition" in one market "for greater competition" in another market, thereby frustrating the goals of the antitrust laws: to preserve vigorous competition in *all* markets. *United States v. Topco Assocs. Inc.*, 405 U.S. 596, 610-11 (1972).

Nearly any two-sided platform could adopt Amex's expansive theory of procompetitive effects to justify even a naked restraint of trade on one side of the platform. For example, an outlet mall that prohibited

retailers from opening another outlet store within sixty miles could claim that it needs such a restraint to ensure that sufficient shoppers visit its outlet mall, thereby allowing the mall to compete with other outlets—even though the restraint plainly inhibits outlet malls' competition for retailers. This Court should not endorse such arguments, which, if accepted, would effectively allow a defendant to suppress competition in one market so long as it uses its supracompetitive profits to benefit a different group of customers in the process. *See id.* at 611-12 (explaining that defendants "keenly aware of their own interests" are not permitted to determine "relative values to society of competitive areas of the economy").

Moreover, adopting the Second Circuit's reasoning could have widespread negative consequences for antitrust enforcement in industries that involve interrelated markets other than two-sided platforms. Any firm in such an industry could try to justify its restraint's anticompetitive effects in the relevant market by pointing to purported procompetitive benefits from the restraint in a separate, interrelated market. Such arguments would likely become widespread because separate markets are often interconnected with each other. For example, the health care industry involves several separate but interrelated markets involving health care providers, insurance companies, and patients. But interconnections between the price of health care services and the price of health insurance does not mean that the medical services that hospitals sell to patients are in the same market as the insurance plans that insurance companies sell to insureds. And a hospital should not be able to justify a restraint that raises prices or decreases quality in the health care services

market by claiming, for example, that the restraint increases innovation in the insurance market. *Cf. United States v. Charlotte-Mecklenburg Hosp. Auth.*, 248 F. Supp. 3d 720, 728-32 (W.D.N.C. 2017) (governments stated § 1 claim against hospital based on hospital's contractual provisions prohibiting insurance companies from encouraging patients to use lower-cost health care services). Allowing such wide-ranging effects to be cognizable would render unmanageable an already complex rule of reason analysis.

II. A Plaintiff Satisfies Its Prima Facie Burden by Demonstrating an Anticompetitive Effect—Such as a Price Increase—on One Side of a Two-Sided Platform.

The Second Circuit's erroneous definition of the relevant market as including both merchant services and cardholder services caused the court to conclude that the government's initial, prima facie burden to establish an anticompetitive effect required showing that the anti-steering rules imposed a "net harm" to competition for both merchants and cardholders. (Pet. App. 54a.) The Court should reject this approach and hold that the government satisfied its prima facie burden here by demonstrating that Amex's anti-steering rules stifle price competition in the market for merchant services.

A. A Plaintiff Should Not Be Required to Predict and Disprove All Possible Procompetitive Benefits to Satisfy Its Prima Facie Burden of Demonstrating an Anticompetitive Effect.

Through decades of experience, the courts have developed a burden-shifting framework to structure the highly complex and fact-intensive rule of reason inquiry. *See* Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 Antitrust L.J. 713, 756-57 (2014). Under this framework, when the plaintiff establishes that a restraint imposes an anticompetitive effect in the relevant market, the burden shifts to the defendant to establish a procompetitive effect from the restraint. *See NCAA*, 468 U.S. at 104-13; *California Dental Ass'n*, 526 U.S. at 788 (Breyer, J., concurring in part & dissenting in part). When the defendant satisfies its burden, the plaintiffs may show that the procompetitive benefits could be achieved through less restrictive means. Finally, if the plaintiff fails to establish such less-restrictive options, the court determines whether the anticompetitive harms outweigh the procompetitive gains. *See* Areeda & Hovenkamp, *supra*, at 430.

This structured framework evolved to achieve a "fair and efficient" system for distinguishing between restraints that harm competition, which are prohibited, and restraints that promote competition, which are allowed. *See Leegin Creative Leather Prods.*, 551 U.S. at 898-99; *see also California Dental Ass'n*, 526 U.S. at 793-94 (Breyer, J., concurring in part & dissenting in part). The serial shifting of burdens strikes an important balance between the litigants. *See* Herbert Hovenkamp, *The Rule of Reason* 16 (Univ. of Penn. Law Sch. Inst. for Law and Econ., Research

Paper No. 17-28 2017) (internet) ("Of all the procedural issues involved in antitrust litigation under the rule of reason, none are more critical than questions about assignment of the burden of proof. . . . "). In particular, by giving plaintiffs the initial burden of showing only anticompetitive effects at the prima facie stage, and leaving to defendants the burden of identifying procompetitive justifications, the burden-shifting framework ensures that plaintiffs are not required to predict and refute "every possible fact or theory" that a defendant might assert to justify its conduct—a herculean standard that would render antitrust enforcement and litigations unfocused and unmanageable. *See FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2237 (2013); *see also* Hovenkamp, *Rule of Reason*, *supra*, at 34 (discussing *Actavis*).

Here, the government satisfied its initial burden at the prima facie stage by establishing that Amex's anti-steering rules had "the effect of raising the price" that merchants pay for credit-card services, *see NCAA*, 468 U.S. at 105, by eliminating any incentive for the credit-card networks to compete to offer lower fees to merchants. (*See* Pet. App. 195a-203a.) Such proof that the anti-steering rules actually "operated to raise prices" in the relevant market should have shifted to Amex the "heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market." *See NCAA*, 468 U.S. at 113; *see also* Hovenkamp, *Rule of Reason*, *supra*, at 22 (discussing *NCAA*).

The court of appeals concluded otherwise, holding that the government had not satisfied its prima facie burden because it had not proven that the anti-steering caused a net anticompetitive effect on *both* merchants and cardholders. (*See* Pet. App. 51a-52a.)

The court appeared to give two reasons that the government's focus on supracompetitive prices for merchants was insufficient. First, the court reasoned that the government should further have calculated the "net" or "two-sided price" of credit-card transactions by offsetting "the value or cost of the rewards paid to cardholders" against the higher merchant fees that funded those rewards. (Pet. App. 53a.) Second, the court reasoned that the government should have shown that the anti-steering rules also reduced the overall volume of credit-card transactions or decreased the quality of credit-card services. (Pet. App. 52a.)

The court of appeals' "net harm" test misconstrues the government's prima facie burden. Both of the court's grounds for finding the government's initial showing defective required the government to prove more than anticompetitive effects in the relevant merchant-services market. But the additional showings that the court would have required are more appropriately seen as part of Amex's burden to prove procompetitive justifications. Under this Court's precedents, it was Amex's burden to demonstrate that its anti-steering rules led to increased cardholder benefits (to the extent that such benefits affect the merchant-services market, see *supra* Point I.B.2), or that the rules contributed to increased output or quality in the merchant-services market. *See NCAA*, 468 U.S. at 113. By requiring the government to *disprove* these procompetitive justifications at the outset, the court of appeals wrongly collapsed the first two steps of the burden-shifting inquiry into a single step.

Mandating that the government predict and disprove potential procompetitive effects simply to show an initial anticompetitive effect in the market

would severely undermine enforcement. The courts have placed the burden on defendants to establish that their conduct creates procompetitive effects because a defendant possesses in-depth knowledge about its own industry, business model, and motivations for imposing a restraint. *See* Areeda & Hovenkamp, *supra*, at 422-23; *see also California Dental Ass'n*, 526 U.S. at 792 (Breyer, J., concurring in part & dissenting in part) (explaining that defendants have incentive to introduce evidence of procompetitive justifications, if such evidence exists). By contrast, a government enforcer usually does not possess such information, and would thus be put in the untenable position of needing to speculate as to every possible rationalization that a defendant might assert for its conduct.

Indeed, this information gap between the litigants would pose particularly difficult hurdles for the government during early stages of litigation. If proving a "net anticompetitive effect" is required at the prima facie stage, as the Second Circuit held, then the government might need to plead such a "net effect" plausibly in its complaint simply to survive a motion to dismiss. *See* Hovenkamp, *Rule of Reason*, *supra*, at 17, 20. *See generally Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (discussing minimum pleading standards). But the government often does not know prior to bringing suit whether a restraint might create procompetitive effects in the relevant market—let alone whether the restraint has procompetitive impacts on one side of a platform that redound to the benefit of the market at issue. By contrast, because the defendant is "in the best position to suggest the benefits that might flow from [its] activities," the plaintiff and court are entitled to presume that no

such benefits exist if the defendant cannot establish them. Areeda & Hovenkamp, *supra*, at 422.

Accepting the Second Circuit's novel rule would thus raise the risk of courts dismissing valid enforcement actions at the outset, even where the defendant's conduct imposes an obvious anticompetitive effect on one side of the platform. Such an approach could significantly harm competition in many sectors of the economy by shielding anticompetitive behavior by dominant firms in industries involving two-sided platforms.

B. Maintaining the Proper Assignment of Burdens Ensures That Potentially Procompetitive Conduct Is Not Chilled by Antitrust Enforcement Efforts.

The court of appeals required the government to disprove procompetitive effects at the prima facie stage based on the concern that, absent such a prima facie showing, antitrust lawsuits might chill genuinely procompetitive activities involving two-sided platforms. Specifically, the Second Circuit reasoned that ignoring interconnections between the two sides of a platform might prevent a firm from engaging in conduct that enhances output on both sides of a platform because of the fear that the firm's conduct could have an apparent anticompetitive effect (e.g., higher prices) on one side of the platform. (Pet. App. 35a (stating that focusing on competitive effects in only the merchant-services market would penalize legitimate competitive activities on the cardholder side "no matter how output-expanding such activities may be").)

The court of appeals' concern about protecting the incentives of firms to engage in procompetitive

activities is legitimate. But this concern is already fully addressed by the established burden-shifting framework. If a plaintiff establishes a prima facie case of anticompetitive harm based on effects on one side of a platform, the defendant has a full and fair opportunity to establish that its conduct creates procompetitive effects in the relevant market. Such procompetitive effects might include that its restraint enhances the platform's output—an effect that could benefit both sides of the platform. And if a defendant establishes a procompetitive effect in the relevant market, the parties may then attempt to show whether or not this procompetitive effect can be achieved through less restrictive means. See *supra* at 7-8. *See* Hovenkamp, *Rule of Reason*, *supra*, at 25. The established burden-shifting framework thus already protects against antitrust analysis too abbreviated to consider fully the competitive factors at play in a market. *See California Dental Ass'n*, 526 U.S. at 793-94 (Breyer, J., concurring in part & dissenting in part).

CONCLUSION

The decision and order of the court of appeals should be reversed and remanded for further proceedings.

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
STEVEN C. WU
Deputy Solicitor General
JUDITH N. VALE
Senior Assistant
Solicitor General
barbara.underwood@ag.ny.gov

BEAU W. BUFFIER
Bureau Chief
ELINOR R. HOFFMANN
Deputy Bureau Chief
JEREMY R. KASHA
Assistant Attorney General
Antitrust Bureau

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* *Counsel of Record*

(Counsel listing continues on next page.)

JAHNA LINDEMUTH
Attorney General
State of Alaska
1031 W. Fourth Ave.
Suite 200
Anchorage, AK 99501

XAVIER BECERRA
Attorney General
State of California
1300 I St.
Sacramento, CA 95814

MATTHEW P. DENN
Attorney General
State of Delaware
Department of Justice
820 N. French St.
Wilmington, DE 19801

DOUGLAS S. CHIN
Attorney General
State of Hawai'i
425 Queen St.
Honolulu, HI 96813

CURTIS T. HILL, JR.
Attorney General
State of Indiana
200 W. Washington St.
Room 219
Indianapolis, IN 46204

ANDY BESHEAR
Attorney General
State of Kentucky
700 Capitol Ave., Suite 118
Frankfort, KY 40601

JANET T. MILLS
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

MAURA HEALEY
Attorney General
Commonwealth of
Massachusetts
One Ashburton Pl.
Boston, MA 02108

LORI SWANSON
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther
King Jr. Blvd.
St. Paul, MN 55155

JIM HOOD
Attorney General
State of Mississippi
Post Office Box 22947
Jackson, MS 39225

HECTOR H. BALDERAS
Attorney General
State of New Mexico
408 Galisteo St.
Santa Fe, NM 87501

ALAN WILSON
Attorney General
State of South Carolina
1000 Assembly St.
Columbia, SC 29201

JOSH STEIN
Attorney General
State of North Carolina
Department of Justice
114 W. Edenton St.
Raleigh, NC 27603

BOB FERGUSON
Attorney General
State of Washington
800 Fifth Ave., Ste. 2000
Seattle, WA 98104

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court St. N.E.
Salem, OR 97301

BRAD SCHIMEL
Attorney General
State of Wisconsin
Department of Justice
P.O. Box 7857
Madison, WI 53703

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania
Strawberry Square, 16th Fl.
Harrisburg, PA 17120

KARL A. RACINE
Attorney General
District of Columbia
Suite 650 North
441 4th St., NW
Washington, DC 20001

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v.

AMERICAN EXPRESS CO., ET AL.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF OPEN MARKETS INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DEEPAK GUPTA
Counsel of Record
DANIEL TOWNSEND
GUPTA WESSLER PLLC
1900 L Street, NW
Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

The Open Markets Institute is a non-profit research organization dedicated to promoting fair and competitive markets. Its mission is to safeguard our political economy from excessive concentrations of private power that undermine competition and threaten liberty, democracy, and prosperity. OMI regularly provides expertise on antitrust law and competition policy to Congress, journalists, and other members of the public. It does not accept any funding or donations from for-profit corporations.

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[1] All parties consent to this brief, and no party's counsel authored it in whole or part. Apart from *amicus curiae*, no person contributed money to fund its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

By introducing a special rule for "two-sided" markets, the Second Circuit needlessly departed from a longstanding approach to antitrust law. Its new rule greatly raises the burden that a plaintiff in the "two-sided" market context must carry at the very earliest stage of litigation. Not only is the new rule unjustified, it is pegged to a concept that is contested and ill-defined. Defendant companies ranging from airlines to chicken processors could reasonably claim that they meet the definition of "two-sided," winning themselves more favorable judicial review.

Basing a fundamental and often decisive inquiry on a slippery definition is a mistake. Troublingly, the Second Circuit's approach also risks exempting from effective antitrust scrutiny the dominant tech platforms, including Amazon, Google, and Facebook. These firms enjoy dominant positions in key markets that provide ample opportunity for anticompetitive conduct, underscoring the need for robust antitrust enforcement. Yet if the Second Circuit's rule is upheld, a wide range of anticompetitive activity would become virtually beyond reach, given the far higher burden that plaintiffs would have to meet to establish even a *prima facie* case. In practice, this approach would risk immunizing dominant platforms from effective antitrust review.

Because this result is intolerable, and because it rests on shaky and malleable economic reasoning, this Court should reverse the Second Circuit's decision.

ARGUMENT

I. A special rule for "two-sided" markets is unnecessary and risks enabling legal arbitrage.

A. The Second Circuit departed from longstanding tradition.

Markets that could be characterized as "two sided" under the Second Circuit's newly-minted framework have been around for centuries. They include grain futures markets (connecting farmers and buyers of farm products), banking (connecting depositors and borrowers), and health maintenance organizations (linking patients and health care providers). The Internet has facilitated a new crop of technologies that essentially play this same role, connecting, for instance, job seekers and employers (LinkedIn) and fliers and airlines (Kayak).

For decades, courts have analyzed potential anticompetitive conduct in such scenarios by considering the specific market defined by the subset of customers allegedly harmed. *See Times Picayune Publ'g Co. v. United States*, 345 U.S. 594 (1953) (holding that a newspaper's restraint affecting advertisers, but not readers, had anticompetitive effect); *Lorain Journal Co. v. United States*, 342 U.S. 143, 152–53 (1951) (same); *Telecor Commc'ns, Inc. v. S.W. Bell Tel. Co.*, 305 F.3d 1124, 1134 (10th Cir. 2002) (holding that a telephone company's restraint affecting pay-phone operators, but not telephone users, had anticompetitive effect); *United States v. Microsoft Corp.*, 253 F.3d 34, 60–62, 65–72 (D.C. Cir. 2001) (focusing an analysis of Microsoft's monopolization of the operating-system market on the anticompetitive effects with respect to software developers, not users).

The Second Circuit unnecessarily eschewed this longstanding form of analysis. It held that the plaintiff bears the initial burden to show not just that the conduct at issue has anticompetitive effects in the market where customers were allegedly harmed, but also that those effects outweigh any benefits in a *separate* market. App. 53a. By adopting this wrong approach, the Second Circuit reached the extraordinary conclusion that a firm can eliminate horizontal price competition for millions of its customers without violating antitrust laws. Its reasoning was premised on the idea that conduct in "two-sided" markets requires a novel rule. App. 35a, 39a. But the only thing new about "two-sided" markets is the terminology.

While antitrust scrutiny of these markets traces back a century, the concept of a "two-sided" market was developed only in the 2000s, following antitrust litigation against Visa and MasterCard.[2] In one of those cases, economists paid by Visa and MasterCard unsuccessfully floated the same basic argument that American Express advances here: that customers alleging anticompetitive harm in the payment-card market must show injury to cardholders as well as to merchants.[3] The Second Circuit instead correctly followed the traditional approach: it

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[2] Richard A. Epstein & Victor P. Goldberg, *Introductory Remarks: Some Reflections on Two-Sided Markets and Pricing*, 2005 Colum. Bus. L. Rev. 509, 509 (2005).

[3] Lloyd Constantine et. al., *In re Visa/MasterMoney Antitrust Litigation: A Study of Market Failure in a Two-Sided Market*, 2005 Colum. Bus. L. Rev. 599, 600 (2005) (noting that "Visa and MasterCard argued that to assert a damage claim in a two-sided market, buyers must show an overcharge impacting both sides of the market, regardless of which side they are on"). Notably, while the argument was advanced by their paid experts, Visa and MasterCard did not heavily push the theory in their pleadings.

construed credit-card companies as operating in "two interrelated, but separate, product markets," found that exclusionary rules injured competition in one of those markets, and held that this showing was sufficient to establish a violation of the Sherman Act. *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003).

In the years since, a group of scholars and consultants has built up a body of work reconceiving these "two interrelated, but separate, product markets," *id.*, as a single "two-sided" market. The Second Circuit's decision relies on this work. But in key instances, the panel relied on a small number of industry-funded studies[4] that are fundamentally at odds with scholarship by leading antitrust thinkers. *See, e.g.*, P. Areeda & H. Hovenkamp, *Antitrust Law*, 2017 Supp ¶565, p.104 (stating that the Second Circuit "incorrectly conclud[ed] that the relevant market in which to consider American Express's anti-steering rules was not limited to the market for network

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[4] The six studies cited in the decision's analysis of "two-sided" markets were all written by at least one author with clear financial connections to the credit-card industry: David S. Evans, Richard Schmalensee, Benjamin Klein, and Andrew Lerner. Mr. Evans has repeatedly served as a paid expert for Visa and has testified on behalf of payment-card clients for over 30 years. *See* David Evans (biography), https://goo.gl/14FccP. Mr. Schmalensee has also repeatedly served as a paid expert for Visa. *See, e.g.*, *United States v. Visa U.S.A*, 163 F. Supp. 2d 322, 331 (S.D.N.Y. 2001); *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 74 (E.D.N.Y. 2000); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 131 (2d Cir. 2001); *SCFC ILC, Inc. v. Visa U.S.A., Inc.*, 819 F. Supp. 956, 984 (D. Utah 1993); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 968 n.13 (10th Cir. 1994); *United States v. Visa U.S.A., Inc.*, 183 F. Supp. 2d 613, 616 (S.D.N.Y. 2001). Finally, Mr. Klein and Mr. Lerner have likewise served as paid consulting and testifying experts for Visa and other credit-card companies. *See* c.v. of Benjamin Klein, https://goo.gl/StVuUa; c.v. of Andrew V. Lerner, https://goo.gl/5S3ZES.

[merchant] services but also included consumers"); *id.* at ¶1505, pp. 170–71 (describing as "troubling" the Second Circuit's "conclusion that when a restraint is alleged in a two-sided market, a *prima facie* case requires the plaintiff to allege net harm aggregated across both sides"); *see generally* Brief of 25 Professors of Antitrust Law as *Amici Curiae* Supporting Petitioners (July 6, 2017) (petition stage).

Even some of the scholarship that the Second Circuit cites in support of its decision—such as work by Jean-Charles Rochet and Nobel Prize recipient Jean Tirole—fails to support the court's position. App. 8a. Credited with pioneering work on platforms that link two or more distinct groups, Rochet and Tirole analyze the various pricing decisions and incentives that face actors in these markets. But neither of their articles cited by the court states that the injury suffered by one set of customers due to anticompetitive restraints should be weighed against potential benefits enjoyed by another set of customers.[5] Insofar as their work *does* examine any balancing or tradeoffs between the two groups, the focus is on levels of *pricing*. Since the conduct at issue is a form of restraint rather than a decision about pricing levels, the work the court cites does not justify the rule it adopted.

Disregarding credible arguments firmly rooted in this Court's antitrust guidance, the Second Circuit adopted an analysis that obfuscates market realities.

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[5] Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 Rand J. Econ. 645, 646, 648 (2006); Jean-Charles Rochet & Jean Tirole, *An Economic Analysis of the Determination of Interchange Fees in Payment Card Systems*, 2 Rev. Network Econ. 69 (2003).

B. Definitions of "two-sided" platforms are too vague and contested to sustain a critical legal distinction.

The Second Circuit introduced an approach to market definition that hinges on whether a firm serves as a platform in a "two-sided" market. But there is no consensus on what constitutes a "two-sided" market,[6] and the parameters of leading definitions can be read broadly. Drawing sharp lines on the basis of a vague and contested definition is a mistake, as it will confuse courts and enable legal arbitrage.

Under one definition of "two-sided" markets, the key feature is that the total volume of transactions is sensitive to the allocation of the prices charged in each market.[7] Say, for example, that a business raises the price it charges Group A (in one market) by three dollars and simultaneously lowers the price it charges Group B (in a second market) also by three dollars. If this change in the *structure* of the relative prices changes the total number of transactions that occur, then the market is considered "two-sided." If, instead, the change does not affect the total volume, then the firm does not operate in a "two-sided" market.

Under this conception, however, even a non-platform firm could self-define as a platform, by treating the prices it pays for inputs as negative prices charged for using the company as a platform to reach buyers. For example, an airline that hiked airfares and increased wages for pilots by the same amount would likely see a

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[6] *See* E. Glen Weyl, *A Price Theory of Multi-Sided Platforms*, 100 Am. Econ. Rev. 1642, 1644 (2010) ("The definition of two-sided markets is controversial.").

[7] Rochet & Tirole, *Two–Sided Markets*, *supra* note 5 at 646, 648.

reduction in the total transaction volume, even as the net price between the two sides remained the same. In this way, even an airline could self-define as a "two-sided" platform.

This lack of clarity is shared by other proposed definitions of "two-sided" markets. Another description, for instance, conceives of them as platforms that (i) can charge different prices to different customer groups, (ii) have market power with respect to those groups, and (iii) generate cross-platform network effects (such that greater usage by group A on one side of the platform makes the platform more attractive to group B on the other side).[8] Again, this definition risks being overly broad. For example, any chicken processor with regional market power could claim status as a platform, since an increase in the number of food retailers it supplies would theoretically also benefit chicken farmers. Upending market definition for sectors ranging from airlines to chicken processing cannot be justified.

Whether a firm gets characterized as a "two-sided" platform may also come to depend on its chosen business model. For example, Netflix charges consumers for content without also seeking advertising revenue, and so would likely be considered "one-sided" under Rochet & Tirole's definition.[9] But a service like Hulu that charges both consumers and advertisers would be "two-sided." The distinction here would be based not on the market in which these firms operate, but on the specific business strategy they adopt. Anti-competitive restrictions imposed by Netflix would effectively be analyzed more harshly than identical restrictions imposed by Hulu—

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[8] Weyl, *supra* note 6.

[9] Rochet & Tirole, *Two-Sided Markets*, *supra* note 5 at 646.

even though both firms compete in the same consumer market. Applying different burden-shifting regimes to companies that operate in the same market and engage in the same anti-competitive conduct makes no sense.

Pegging a fundamental inquiry in antitrust analysis to a concept that has no clear parameters is dangerous. It will encourage a wide swath of firms to seek shelter under this more permissive approach. Lacking a coherent and precise definition of "two-sided" markets, courts will be left to base their analysis on irrelevant aspects of companies' self-definition and business models, rather than on features distinguishing actual industry realities. This Court should reassert its traditional analysis of market definition and reject the Second Circuit's slippery approach.

II. The Second Circuit's approach risks immunizing some of the most dominant companies in America's political economy from antitrust scrutiny.

A. A small number of tech platforms mediate a growing share of our commerce and communications.

While it is not new for one intermediary firm to engage in two distinct but related markets, Internet technologies have enabled the rapid rise of platform companies that fit this description. These firms exercise power over a large and growing share of our nation's commerce and communications. Apple, Alphabet (Google's parent company), Microsoft, Amazon, and Facebook are the world's largest companies by market valuation.[10] All are

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[10] Martin Wolf, *Taming the masters of the tech universe*, Fin. Times (Nov. 14, 2017), http://on.ft.com/2AnuHX0.

major platforms that operate in markets that could easily be characterized as "two-sided."

Due to the nature of digital markets, these firms can wield great leverage over both sellers and buyers of goods and services. This has two effects on our political economy. First, it enables platforms to leverage their existing dominance to further entrench their positions and keep out new rivals—conditions susceptible to anticompetitive behavior. Second, it provides them an opportunity to manipulate the interactions between buyers and sellers in ways that may harm both.[11]

Amazon, for example, already captures one of every two dollars spent online, and around half of all online shopping searches begin on its platform.[12] The company accounts for more than 80 percent of e-book sales and is now the second-biggest seller of apparel and footwear in the U.S.[13] In addition to being a dominant retailer, Amazon is also a manufacturer, a massive logistics network, a book publisher, a producer of TV and film, a lender of credit, and the biggest provider of cloud-computing services. News of the company's decisions (or even just speculation around them) regularly causes valuations to plummet and spurs companies to merge.[14]

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[11] Barry C. Lynn, *Killing the Competition*, Harper's (Feb. 2012) http://bit.ly/2BnkRIk.

[12] Olivia LaVecchia & Stacy Mitchell, *Amazon's Stranglehold: How the Company's Tightening Grip Is Stifling Competition, Eroding Jobs, and Threatening Communities*, Inst. For Loc. Self-Reliance 10 (Nov. 2016), http://perma.cc/A4ND-2NDJ.

[13] Brian Heater & Anthony Ha, *A decade of Amazon Kindle*, Tech Crunch (Nov. 19, 2017), http://bit.ly/2AoT6eC; Matthew Boyle, *The Retail Apocalypse Is Fueled by No-Name Clothes*, Bloomberg (Dec. 11, 2017), http://bit.ly/2jRJlPY.

[14] Evelyn Cheng, *Amazon's new Whole Foods discounts wipe out nearly $12 billion in market value from grocery sellers*, CNBC

The firm's history of capturing markets means that investors today effectively allocate capital in many sectors of the U.S. economy based on actions Amazon takes or might take.

Google, meanwhile, enjoys 78 percent of the online search advertising market and captures 55 percent of the global web browser market.[15] Sixty-six percent of smartphone users rely on its Android operating system.[16] Facebook controls 77 percent of mobile social-networking traffic in the United States, and 53 percent of Americans use Facebook every day.[17] Together Google and Facebook are set to command 84 percent of the digital ad market globally, and are capturing 99 percent of the growth.[18] With their dominant positions, these two firms wield outsized control over the flow of information

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(Aug. 24, 2017), http://bit.ly/2BjB1mb; Thomas Franck, *Shares of dental suppliers drop on potential new threat from Amazon*, CNBC (Dec. 6, 2017), http://bit.ly/2ktriiB; Sarah Todd, *The CVS-Aetna deal is actually all about Amazon*, Quartz (Dec. 3, 2017), http://bit.ly/2zOboph.

[15] Shannon Bond, *Google and Facebook build digital ad duopoly*, Fin. Times (Mar. 14, 2017), http://on.ft.com/2npS0cv; Mark Bergen & Scott Moritz, *Google Pays to Put Search Back on Firefox Browser in U.S.*, Bloomberg (Nov. 14, 2017), https://bloom.bg/2jShAGY.

[16] *iPhone market share slips in October-quarter*, Reuters (Dec. 5, 2017), http://reut.rs/2ChtLVr.

[17] Robert Verbruggen, *Google Facebook, Amazon: Our Digital Overlords*, Nat'l Rev. (Dec. 12, 2017), http://bit.ly/2Aoi5Pt; Robinson Meyer, *Facebook Is America's Favorite Media Product*, The Atlantic (Nov. 11, 2016), http://theatln.tc/2ePLZU4.

[18] Matthew Garrahan, *Google and Facebook dominance forecast to rise*, Fin. Times (Dec. 3, 2017), http://on.ft.com/2jKl913; Matthew Spector, *Facebook's Russia Problem Proves Feds Are Missing the Point*, WIRED (Nov. 16, 2017), http://bit.ly/2zbFxB4.

in society.[19] And as Americans have learned over the last year, this control appears to give them even the power to censor viewpoints and sway elections.[20]

Given the increasingly dominant role a small number of tech platforms play in our political economy today, the implications of the Second Circuit's new rule are especially troubling.

B. By dramatically raising the plaintiffs' initial burden, the Second Circuit's rule will exempt platforms from effective antitrust review.

The nature of digital markets, along with the slowness of antitrust officials to grasp the reality of how these markets work, suggests that the platform giants of today will continue to dominate numerous realms of our economy and society for years to come. Key features of these markets—such as the fact that established players dominate without facing any real threat of entry—raise the likelihood of anticompetitive conduct, and thereby raise the importance of antitrust enforcement. But the Second Circuit's new rule risks exempting platforms from real scrutiny.

Effective antitrust enforcement in these markets is paramount because (1) rivals are not likely to dislodge Amazon, Google, and other platforms from their dominant roles and (2) the increasingly essential nature of the services they provide gives them immense leverage over sellers and buyers across markets. Several factors account for entry barriers. First is the fact of network

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[19] Robert Verbruggen, *Google Facebook, Amazon: Our Digital Overlords*, Nat'l Rev. (Dec. 12, 2017), http://bit.ly/2Aoi5Pt; Wolf, *supra* note 10.

[20] Emily Bell, *Silicon Valley helped Russia sway the election*, The Guardian (Oct. 29, 2017), http://bit.ly/2ifTRia.

effects, whereby each additional user of the network enhances the value of the entire network, yielding a massive edge to players that acquire an early lead.[21] Second, a platform's control over data tends to entrench its position.[22] Access to user data enables platforms to better customize services and gauge demand, and also positions firms to leverage insights collected in one market to benefit another business line.[23] Network effects combined with the self-reinforcing advantages of data means that tech platform markets are winner-take-all: a company looking to compete in these markets must seek to capture them.

The winner-take-all nature of platform markets, in turn, incentivizes potentially anti-competitive conduct. Amazon, for example, established dominance as an online platform partly through sustaining losses and engaging in predatory pricing; indeed, it consistently listed negative returns for the first seven years it was in business.[24] Yet Amazon's stock price has soared despite the fact that it has invested most profits into infrastructure investments or pricing below cost. In essence, investors have given Amazon a free pass to grow without any pressure to show profits—enabling the firm to sink money to capture market share and acquire rivals. A similar situation is at play with Uber: it lost $708 million in the first quarter of 2017 alone, yet investors "applauded."[25] By rationalizing the pursuit of growth at the

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[21] Maurice Stucke & Allen Grunes, BIG DATA AND COMPETITION 163 (2016).

[22] Frank Pasquale, BLACK BOX SOCIETY 83 (2015).

[23] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L. J. 710, 780–83 (2017).

[24] *Id.*

[25] Seth Fiegerman, *Uber is losing billions: Here's why investors*

expense of returns, platform markets incentivize predation. In other words, not only do these markets suffer from a lack of competition, but—given the dynamics of digital markets—they are also more conducive to anti-competitive conduct, underscoring the need for effective antitrust.

Critically, the informational advantages that dominant tech platforms enjoy enable them to quash nascent rivals in the bud. Facebook, for example, uses a privacy application it acquired to track closely which rival products divert users from Facebook. This "unusually detailed look at what users collectively do on their phones" serves as an "early bird" warning system to flag potential competitors.[26] By seeing which other products and features are doing well, Facebook can target fast-growing rivals by rolling out replicas, or can seek to purchase the companies themselves. And because Facebook can spot product success before anyone else, it can acquire firms for far cheaper than what it would pay absent its informational advantage—and can do so without triggering antitrust review. In this way, platform markets have created new pathways for dominant actors to choke off start-ups and undermine innovation.[27] This Court's ruling has the potential to add an artificial legal advantage to the structural market advantages these companies already enjoy.

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[26] Betsy Morris & Deepa Seetharaman, *The New Copycats: How Facebook Squashes Competition from Startups*, Wall St. J. (Aug. 9, 2017), http://on.wsj.com/2vmw4TT.

[27] Elizabeth Dwoskin, *Facebook's willingness to copy rivals' apps seen as hurting innovation*, Wash. P. (Aug. 10, 2017), http://wapo.st/2kt3E5B.

Affirming the Second Circuit will likely stymie one of the main avenues for antitrust enforcement. While antitrust agencies have shown some interest in policing abuses by dominant platforms, there is growing evidence that their enforcement efforts have lagged behind the evolving realities of market power in digital markets. Despite finding that Google violated antitrust laws on three counts, for instance, the Federal Trade Commission failed to bring an action, settling for voluntary concessions from Google instead.[28] The agency missed an important opportunity for halting anticompetitive conduct and, by doing so, closed off the market to new entrants at a critical moment.[29] By dramatically expanding what a plaintiff must allege in establishing a *prima facie* case, the Second Circuit's rule will pose a major obstacle to much-needed enforcement.

Given that tech platform markets are ripe for anticompetitive conduct, an approach that risks immunizing dominant platforms from antitrust scrutiny is deeply problematic. If the Second Circuit's novel rule is allowed to persist, these firms will further centralize control over commerce and communications, undermining open markets, free enterprise, and core liberties.

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[28] Brody Mullins et al., *Inside the U.S. Antitrust Probe of Google*, Wall St. J. (Mar. 19, 2015), http://perma.cc/H4PZ-JZ9K.

[29] Frank Pasquale, *Paradoxes of Digital Antitrust: Why the FTC Failed to Explain Its Inaction on Search Bias*, Harv. J. L. & Tech. Occasional Paper Series, July 2013, http://bit.ly/2AF0Tcq.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

DEEPAK GUPTA
Counsel of Record
DANIEL TOWNSEND
GUPTA WESSLER PLLC
1900 L Street, NW
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

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Counsel for Amicus Curiae

No. 16-1454

IN THE

Supreme Court of the United States

OHIO, ET AL.,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA SUPPORTING AFFIRMANCE

JOSEPH OSTOYICH
WILLIAM LAVERY
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 639-7700

AARON M. STREETT
Counsel of Record
J. MARK LITTLE
BAKER BOTTS L.L.P.
910 Louisiana St.
Houston, TX 77002
(713) 229-1234
aaron.streett@bakerbotts.com

Counsel for Amicus Curiae Pharmaceutical Research and Manufacturers of America

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Whether Section 1 of the Sherman Act condemns a vertical restraint in a case where the defendant lacks market power and the plaintiff fails to offer evidence of reduced output or supracompetitive prices in the affected market.

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA SUPPORTING AFFIRMANCE

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Pharmaceutical Research and Manufacturers of America ("PhRMA") represents the country's leading innovative pharmaceutical and biotechnology companies. The question presented in this case implicates many of the common vertical agreements PhRMA's member companies employ to efficiently structure their business activities in a procompetitive manner. PhRMA

[1] Petitioners' and Respondents' counsel of record consented to the filing of this brief by filing blanket consents with the Clerk. In accordance with this Court's Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* or their counsel, have made a monetary contribution to the preparation or submission of this brief.

seeks to ensure that the Court not lose sight of these ubiquitous contractual arrangements that have typically received traditional rule-of-reason scrutiny under the antitrust laws. PhRMA fears that a retreat from the Court's traditional rule-of-reason treatment of non-collusive vertical restraints would inflict deleterious consequences on PhRMA's members, the patients those members serve, and the U.S. economy as a whole.

SUMMARY OF ARGUMENT

Formulating clear, predictable rules that do not unduly deter procompetitive conduct has been the focal point of antitrust jurisprudence for decades. It is now settled law that non-collusive vertical restraints receive traditional rule-of-reason treatment, that it is exceedingly difficult to demonstrate competitive harm in the face of increased output, and that a lack of market power effectively rules out any anticompetitive effects. The Second Circuit faithfully applied each of these principles, but Petitioners wish to abandon them in favor of a markedly new approach to evaluating non-collusive vertical restraints. Adopting that approach would result in the uncertainty and over-deterrence that this Court has so carefully avoided. A host of common, procompetitive vertical restraints would be imperiled, an outcome that would harm businesses, consumers, and the economy as a whole. The Court should decline Petitioners' invitation to forge a new framework for evaluating non-collusive vertical restraints and instead reaffirm its commitment to the predictable, appropriately calibrated rules for analyzing these typically procompetitive arrangements.

ARGUMENT

I. THIS COURT HAS REPEATEDLY RECOGNIZED THE IMPORTANCE OF CLEAR, PREDICTABLE RULES IN THE ANTITRUST CONTEXT

This Court "ha[s] repeatedly emphasized the importance of clear rules in antitrust law." *Pac. Bell Tel.*

Co. v. *Linkline Commc'ns, Inc.*, 555 U.S. 438, 452 (2009). It has long sought to structure its antitrust jurisprudence to "provide guidance to the business community and to minimize the burdens on litigants and the judicial system." *Cont'l T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977). And it has consciously made efforts to develop antitrust rules that promote "business certainty and litigation efficiency." *Arizona* v. *Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 343-344 (1982). In this respect, the Court agrees with Professor Areeda that "[n]o court should impose a duty * * * that it cannot explain or adequately and reasonably supervise." *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414-415 (2004) (quoting Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 853 (1989)).

Providing meaningful guidance to the business community has been a particular emphasis of this Court's antitrust jurisprudence. The Court has recognized the insufficiency of an antitrust regime that leaves "businessmen * * * with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act." *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 609 n.10 (1972). It has thus sought to "establish the litigation structure to ensure" that antitrust law "operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses." *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 898-899 (2007).

The impetus for this policy is not to benefit any individual business, but rather to foster the procompetitive conduct that drives a healthy economy. This Court has observed that vague or overbroad antitrust rules "are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594

(1986). In other words, courts "must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition" or other procompetitive conduct. *Ibid.* (quoting *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983)).

II. Antitrust Law Has Achieved A Measure Of Predictability By Establishing Clear Rules To Govern Certain Categories Of Typically Procompetitive Conduct

Through decades of common-law refinement, courts have achieved much of the desired predictability by establishing clear rules to protect categories of procompetitive conduct that typically do not run afoul of the antitrust laws. The first such rule discussed below recognizes that traditional rule-of-reason analysis will apply to non-collusive vertical restraints. That mode of analysis places the burden on plaintiffs to prove that such restraints have actual anticompetitive effects. The second and third rules recognize that plaintiffs will be unable to make that showing when the defendant lacks market power or when the challenged restraint does not reduce output. These clear rules provide notice to businesses that they may engage in the protected categories of conduct without fearing antitrust liability. We briefly discuss each in turn.

A. It is settled law that non-collusive vertical restraints are evaluated under the traditional rule of reason

First, it is settled that non-collusive vertical restraints are lawful unless the plaintiff can show under the rule of reason that the challenged restraint has actual anticompetitive effects. In other words, "virtually all vertical agreements now receive a traditional rule-of-reason analysis," *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 318 (3d Cir. 2010), as opposed to heightened forms of

antitrust scrutiny that place far lesser demands on the plaintiff. This Court has held as much on multiple occasions. See *Leegin*, 551 U.S. at 907 ("Vertical price restraints are to be judged according to the rule of reason."); *State Oil Co.* v. *Khan*, 522 U.S. 3, 22 (1997) ("[V]ertical maximum price fixing * * * should be evaluated under the rule of reason."). That approach pervades the courts of appeals as well. See, *e.g.*, *In re Musical Instruments Antitrust Litig.*, 798 F.3d 1186, 1191-1192 (9th Cir. 2015) ("Vertical agreements * * * are analyzed under the rule of reason * * *."); *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 272 (6th Cir. 2014) ("Vertical restraints * * * are subjected to the rule of reason."); *K.M.B. Warehouse Distribs.* v. *Walker Mfg. Co.*, 61 F.3d 123, 127 (2d Cir. 1995) ("We analyze this sort of allegedly anticompetitive practice—a vertical conspiracy that does not involve price-fixing—according to the 'rule of reason.'").

By contrast, other types of restraints merit more skeptical treatment, under which the plaintiff need not show anti-competitive effects. The quick-look approach "shift[s] to a defendant the burden to show empirical evidence of procompetitive effects" without the need for the plaintiff to first demonstrate competitive harm. *Cal. Dental Ass'n* v. *FTC*, 526 U.S. 756, 775 n.12 (1999). That special treatment is appropriate only where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Id.* at 770. Examples include horizontal restraints such as "an absolute ban on competitive bidding," *ibid.* (quoting *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 692 (1978)), and "a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire," *ibid.* (quoting *FTC* v. *Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986)).

Going a step further, the *per se* rule "treat[s] categories of restraints as necessarily illegal [and] eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work." *Leegin*, 551 U.S. at 886. But the *per se* rule "is confined to restraints * * * 'that would always or almost always tend to restrict competition and decrease output,'" such as "horizontal agreements among competitors to fix prices or to divide markets." *Ibid.* (quoting *Bus. Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)).

Non-collusive vertical restraints fall outside the scope of these two alternative modes of analysis because vertical restraints often have procompetitive effects. "Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers." See *Cont'l T. V.*, 433 U.S. at 54-55. Indeed, vertical restraints can "stimulate interbrand competition—the competition among manufacturers selling different brands of the same type of product—by reducing intrabrand competition—the competition among retailers selling the same brand." *Leegin*, 551 U.S. at 890; see also *id.* at 903-904 ("[V]ertical nonprice restraints have impacts similar to those of vertical price restraints; both reduce intrabrand competition and can stimulate retailer services."). And it is interbrand competition that is most important, for its protection is "the primary purpose of the antitrust laws." *Khan*, 522 U.S. at 15.

For those reasons, "the Court, following a common-law approach, has continued to temper, limit, or overrule once strict prohibitions on vertical restraints." *Leegin*, 551 U.S. at 901. That project has resulted in what is now the settled law that the traditional rule of reason governs non-collusive vertical restraints.

B. It is settled law that demonstrating reduced output is a virtual requirement of showing competitive harm

Second, courts have reached a consensus that showing reduced output is nearly always part of a plaintiff's burden to demonstrate anticompetitive effects. Conversely, it is almost impossible for a plaintiff to demonstrate anticompetitive effects in the face of increased output. As this Court explained in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, when "output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand" as with competitive harm. 509 U.S. 209, 237 (1993). For that reason, "a jury may not infer competitive injury from [this kind of] price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level." *Ibid.* Adducing such evidence is "difficult * * * in the best of circumstances." *Id.* at 233.

The courts of appeals have followed this Court's reasoning and applied it in a variety of contexts. They have emphasized the importance of a plaintiff's demonstrating reduced output to prove an injury to competition. See, *e.g.*, *Procaps S.A.* v. *Patheon, Inc.*, 845 F.3d 1072, 1084-1085 (11th Cir. 2016) (listing "reduction of output" as one of three identified "actual anticompetitive effects," along with increased price and deteriorating quality); *Sterling Merch., Inc.* v. *Nestle, S.A.*, 656 F.3d 112, 121 (1st Cir. 2011) ("Injury to competition is usually measured by a *reduction in output* and an *increase in prices* in the relevant market.") (internal quotation marks omitted). Moreover, the courts of appeals have recognized that increased output is typically evidence of robust competition and is thus an impediment to a successful antitrust claim. See, *e.g.*, *Am. Steel Erectors* v. *Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing*

Iron Workers, 815 F.3d 43, 60 (1st Cir. 2016) ("[T]he very purposes of the antitrust laws [are] encouraging efficiency, lowering costs, and increasing output."); *McWane, Inc.* v. *FTC*, 783 F.3d 814, 840-841 (11th Cir. 2015) (listing "increas[ing] output" as a "procompetitive justification[]" for conduct that otherwise harms competition).

Professors Areeda and Hovenkamp confirm the critical role of output in demonstrating competitive harm: "In a rule of reason case the plaintiff must first allege and show that the challenged restraint is of a type reasonably calculated to have anticompetitive effects, *ordinarily measured by reduced output in a properly defined market*." 7 Areeda & Hovenkamp, Antitrust Law ¶ 1504b, at 415 (4th ed. 2017) (emphasis added).

C. It is settled law that a company must have market power to cause competitive harm

Third, courts consistently acknowledge that a company that lacks market power cannot cause competitive harm absent collusion. That is because a company without market power cannot unilaterally restrict industry-wide output sufficient to raise prices. The courts of appeals have embraced that maxim, declaring that "[t]he first requirement in every suit based on the Rule of Reason is market power, without which the practice cannot cause those injuries * * * that matter under the federal antitrust laws." *Menasha Corp.* v. *News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004). See, *e.g.*, *Buccaneer Energy, Inc.* v. *Gunnison Energy Corp.*, 846 F.3d 1297, 1312 (10th Cir. 2017) ("Once a legally sufficient market has been identified, the plaintiff must then show market power * * * ."); *Rebel Oil Co.* v. *Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) ("Without market power to increase prices above competitive levels, and sustain them for an extended period, a predator's actions do not threaten consumer welfare."). Statements from this Court support that principle as well. See *Lee-*

gin, 551 U.S. at 885-886 ("Whether the businesses involved have market power is a further, significant consideration."); *Cal. Dental*, 526 U.S. at 782 (Breyer, J., concurring) (asking whether defendant had "sufficient market power to make a difference"); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (defining the rule of reason as "an inquiry into market power and market structure designed to assess [a restraint's] actual effect").

* * *

These three principles have become increasingly entrenched in recent years. Businesses rely upon these axioms to guide their behavior. If a business lacks market power or employs a non-collusive vertical restraint that does not reduce output, it has been able to confidently predict that its conduct would be reviewed under the traditional rule of reason and found lawful. The strength and clarity of these principles deter meritless litigation and dispose of most cases within their scope at summary judgment, because the plaintiff fails to make the required showing of actual anticompetitive effects. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 Geo. Mason L. Rev. 827, 828-829 (2009) (explaining that between 1999 and 2009, plaintiffs failed to establish anticompetitive effects in 97% of rule-of-reason cases, "nearly all" of which were decided on summary judgments or motions to dismiss).

III. Reversing The Decision Below And Adopting Petitioners' Approach Would Undermine These Well-Defined Rules And Unsettle Antitrust Law

A. The decision below reaffirms the critical antitrust rules that businesses have come to rely on

The Second Circuit relied on each of the rules discussed above to hold that the plaintiffs had not met their burden under a traditional rule-of-reason analysis.

First, the court noted that "all parties * * * agree that Amex's NDPs are a vertical restraint," Pet. App. 29a, and recited the settled law that "[v]ertical restraints 'are generally judged under the rule of reason.'" *Id.* at 26a (quoting *Anderson News, L.L.C.* v. *Am. Media, Inc.*, 680 F.3d 162, 183 (2d Cir. 2012)). It then recognized the black-letter law that under the rule of reason "a plaintiff bears the initial burden of demonstrating that a defendant's challenged behavior 'had an actual adverse effect on competition as a whole in the relevant market.'" *Id.* at 27a (quoting *Capital Imaging Assocs., P.C.* v. *Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993)).

Applying those principles, the court held that the plaintiffs had "offered no such proof." *Id.* at 52a. Instead, their proof focused almost exclusively on harm to merchants when "the market as a whole includes both cardholders and merchants." *Id.* at 50a (emphasis omitted). Although "[p]laintiffs might have met their initial burden under the rule of reason by showing either that cardholders engaged in fewer credit-card transactions (*i.e.*, reduced output), that card services were worse than they might otherwise have been (*i.e.*, decreased quality), or that Amex's pricing was set above competitive levels within the credit-card industry (*i.e.*, supracompetitive pricing)," they failed to make any of those showings necessary to demonstrate competitive harm. *Id.* at 52a. That ended the case under the rule-of-reason framework. *Id.* at 52a-54a.

Second, the Court of Appeals relied on the essential role of output in demonstrating competitive harm. It quoted this Court's holding that "when output expands at the same time that prices increase, 'rising prices are equally consistent with growing product demand' as with anticompetitive behavior," such that a fact-finder "'may not infer competitive injury from [that kind of] price and

output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level." *Id.* at 29a (quoting *Brooke*, 509 U.S. at 237). The evidence here demonstrated "that industry-wide transaction volume has substantially increased"—the very antithesis of decreasing competition. *Id.* at 52a (emphasis omitted). "[G]iven [this] evidence showing that the quality and output of credit cards across the entire industry continues to increase," the court "conclude[d] that Plaintiffs failed to carry their burden to prove" competitive harm. *Id.* at 54a.

Third, the court recognized that plaintiffs "may establish anticompetitive effects indirectly by showing that the defendant has 'sufficient market power to cause an adverse effect on competition.'" *Id.* at 27a (quoting *Tops Mkts., Inc.* v. *Quality Mkts., Inc.*, 142 F.3d 90, 96 (2d Cir. 1998)). The court held there was insufficient evidence to support the district court's finding of market power because it "relied on cardholder insistence as support for" that finding. *Id.* at 45a. But "[c]ardholder insistence results not from market power, but instead from competitive benefits on the cardholder side of the platform and the concomitant competitive benefits to merchants who choose to accept Amex cards." *Ibid.* "That Amex might not enjoy market power without continuing investment in cardholder benefits indicates, if anything, *a lack* of market power * * * ." *Id.* at 46a. Because "[w]hatever market power Amex has appears, on this record, to be based on its rewards programs and perceived prestige," the court held that the plaintiffs had not met their burden of proving competitive harm under the rule of reason. *Id.* at 48a.

B. Petitioners' approach would undermine those rules and usher in an era of uncertain antitrust liability

Petitioners offer a radical alternative to the Second Circuit's traditional approach. They would jettison the three rules that make up the foundation of that decision and instead blaze a new, open-ended path for antitrust law.

1. *Petitioners' approach effectively subjects non-collusive vertical restraints to quick-look scrutiny*

Petitioners first seek to escape traditional rule-of-reason treatment for the non-collusive, vertical restraints at issue here by arguing that although "Amex's merchant agreements are vertical in nature, they have horizontal effects because they limit competition among Amex, Visa, MasterCard, and Discover over merchant prices." Pet. Br. 16. According to Petitioners, those "horizontal effects" on competition, combined with the non-collusive adoption of similar vertical restraints by others in the industry, justifies "more careful scrutiny." *Id.* at 34 (quoting *Leegin*, 551 U.S. at 897).

Before turning to what Petitioners mean by "more careful scrutiny," it is important to appreciate the sweeping implications of their threshold for triggering such scrutiny. If a vertical restraint no longer merits traditional rule-of-reason treatment merely because it has some "horizontal effect" on competition, then virtually all vertical restraints must be subjected to this "more careful scrutiny." That is because, much like the literal language of the Sherman Act, Petitioners' test "could be interpreted to [apply to] all contracts." *Leegin*, 551 U.S. at 885. By definition, a restraint restrains. And if the bar for Petitioners' "more careful scrutiny" is simply a restraining effect on interbrand competition, then it is difficult to imagine a vertical restraint that would not qualify.

Indeed, every contract between a seller and a buyer "restrains" the seller's interbrand rivals by limiting the amount of product they can sell to that buyer. Petitioners' "more careful scrutiny" would thus become the new default test in antitrust law, contradicting this Court's repeated admonition to "presumptively appl[y] rule of reason analysis." *Texaco Inc.* v. *Dagher*, 547 U.S. 1, 5 (2006).

Furthermore, Petitioners' "more careful scrutiny" is a stark departure from the traditional rule-of-reason framework in which the plaintiff bears the initial burden of demonstrating anticompetitive effects. It much more closely resembles the quick-look approach that shifts the initial burden to the defendant. To be sure, Petitioners pay lip service to their burden to demonstrate anticompetitive effects, but they reduce it to a triviality. To them, demonstrating an increase in merchant fees is sufficient to discharge that burden. Pet. Br. 37-40. But that approach focuses on one partial measure of competition (price) on one side (merchants) of the two-sided credit-card market, to the exclusion of all the other relevant factors (including, most importantly, increased output and robust competition for cardholders' business). After all, price may increase for all sorts of entirely legitimate reasons, including demand increases, cost increases, innovation, and improved quality or functionality. Such incomplete evidence has never been sufficient to meet a plaintiff's burden under the rule of reason. If that is all that is required to carry a plaintiff's burden under the "more careful scrutiny" standard, then it effectively becomes the quick-look approach for any plaintiff creative enough to manipulate the data to yield some incomplete indication of potential anticompetitive effects.

Under Petitioners' view, something akin to the quick-look approach—designed to apply to a narrow category of highly suspect restraints—would effectively replace

the traditional rule-of-reason analysis for an amorphous category of non-collusive, vertical restraints. Such a result would upset decades of precedent and mark a course reversal in the development of antitrust law.

2. *Petitioners' approach permits antitrust liability even in the face of increased output and lack of market power*

Petitioners' transformation of antitrust analysis would also end the settled safe harbors of increased output and a lack of market power. Petitioners do not question the irrefutable evidence of "increased output" in the form of "a dramatic increase in transaction volume across the entire credit-card industry." Pet. App. 52a. Nor do they challenge the Second Circuit's holding that Amex lacked market power. See *id.* at 45a-48a. Despite those two heretofore virtually impenetrable barriers to demonstrating competitive harm, Petitioners nevertheless insist that the "real-world pricing effects for the entire industry met the Government's burden to show that Amex's provisions harm consumers." Pet. Br. 40 (emphasis omitted). In other words, merely showing an increase in merchant fees—a patently incomplete demonstration of anticompetitive effects for the reasons discussed above—suffices to overcome uncontested evidence of increased output and lack of market power. If that is all that is needed to overcome these safe harbors under Petitioners' approach, their protection would become illusory. And the decades of precedent developing them would be effectively overruled.

IV. The Resulting Uncertainty Would Chill A Broad Range Of Common Procompetitive Conduct, Thereby Harming Businesses, Consumers, And The U.S. Economy

In casting aside decades of antitrust precedent, Petitioners' novel approach would call into question a number of procompetitive vertical restraints that have long been

thought to pass muster under the antitrust laws. Businesses would be deterred from entering into such arrangements due to the uncertainty of facing expensive antitrust litigation, if not liability.

A. Exclusive-dealing arrangements and most-favored-nation clauses are common, procompetitive devices that have long been evaluated under the traditional rule of reason

Exclusive-dealing arrangements and most-favored-nation clauses are two examples of common vertical restraints that would become much more risky endeavors under Petitioners' approach. An exclusive-dealing arrangement is an "agreement in which a buyer agrees to purchase certain goods or services only from a particular seller for a certain period of time." *Eisai, Inc.* v. *Sanofi Aventis U.S., LLC*, 821 F.3d 394, 403 (3d Cir. 2016). Most-favored-nation clauses "are standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favorably as any of their other customers." *Blue Cross & Blue Shield United of Wis.* v. *Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995).

Companies in many sectors of the economy, including PhRMA's members, routinely employ these contractual devices for procompetitive purposes. "[I]t is widely recognized that in many circumstances [exclusive-dealing arrangements] may be highly efficient—to assure supply, price stability, outlets, investment, best efforts or the like—and pose no competitive threat at all." *E. Food Servs., Inc.* v. *Pontifical Catholic Univ. Servs. Ass'n, Inc.*, 357 F.3d 1, 8 (1st Cir. 2004); see also *Menasha Corp.*, 354 F.3d at 663 ("[C]ompetition for the contract is a vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress."). For example, in *Stop & Shop Supermarket Co.* v. *Blue Cross & Blue Shield of Rhode Island*, 373 F.3d 57

(1st Cir. 2004), the court recognized that a health-insurance company's agreement to grant "certain drug stores the exclusive right to supply * * * drugs to most of its customers" "should lower the cost to [the health-insurance company] of supplying drugs to customers (because most suppliers will cut prices in exchange for increased volume)." *Id.* at 62. And, assuming that the health-insurance market is functioning properly, the company should "pass the savings on to customers (lower premiums, smaller co-payments, broader coverage)." *Ibid.*

Similarly, most-favored-nation clauses are "the sort of [procompetitive] conduct that the antitrust laws seek to encourage." *Blue Cross & Blue Shield United of Wis.*, 65 F.3d at 1415. Indeed, "a policy of insisting on a supplier's lowest price—assuming that the price is not 'predatory' or below the supplier's incremental cost—tends to further competition." *Ocean State Physicians Health Plan, Inc.* v. *Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1110 (1st Cir. 1989). In *Ocean State*, for instance, a health-insurance company negotiated for a most-favored-nation clause in its contracts with physicians under which "it would not pay a provider physician any more for any particular service than she was accepting from * * * any other private health care purchaser." *Ibid.* Considering that paradigmatic example of a most-favored-nation clause, "it would seem silly to argue that a policy to pay the same amount for the same service is anticompetitive." *Ibid.* (quoting *Ocean State Physicians Health Plan, Inc.* v. *Blue Cross & Blue Shield of R.I.*, 692 F. Supp. 52, 71 (D.R.I. 1988)).

These ubiquitous contractual arrangements currently fall under the traditional rule-of-reason analysis for non-collusive vertical restraints and enjoy the full protection of the output and market-power safe harbors. See, *e.g.*, *Eisai*, 821 F.3d at 403 ("[A]n exclusive dealing arrange-

ment * * * is * * * judged under the rule of reason."); *Blue Cross & Blue Shield United of Wis.*, 65 F.3d at 1415. PhRMA's members regularly undertake these arrangements, confident in the clear guidance given by the rules established in existing case law.

B. Petitioners' approach would have a chilling effect on these and other procompetitive vertical restraints by potentially subjecting them to heightened review

The treatment of these and other vertical restraints is uncertain under Petitioners' vision of antitrust law. Much like Amex's NDPs (and virtually all vertical restraints), exclusive-dealing arrangements and most-favored-nation clauses certainly have some "horizontal effects because they limit competition." Pet. Br. 16 (emphasis omitted). For example, it is well-recognized that "exclusive dealing arrangements may deprive competitors of a market for their goods." *Eisai*, 821 F.3d at 403. Under Petitioners' reasoning, that may be sufficient to trigger the "more careful scrutiny" that shifts the burden to defendants to prove the restraint's procompetitive effects. But antitrust law has always required a more rigorous showing before applying quick-look review or otherwise shifting the burden to defendant. Exclusive-dealing arrangements have not qualified for that skeptical treatment because, like most vertical restraints, "they can also offer consumers various economic benefits, such as assuring them the availability of supply and price stability." *Ibid.* Whether exclusive dealing and other common vertical arrangements would continue to receive traditional rule-of-reason treatment under Petitioners' framework is unknown at best.

As a result, adopting Petitioners' approach would "chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594. Businesses would likely refrain from using procompetitive vertical re-

straints that they have long employed to efficiently serve their customers. The overzealous "search for a particular type of undesirable * * * behavior [would] end up * * * discouraging legitimate * * * competition" facilitated by those non-collusive vertical restraints. *Ibid.* (quoting *Barry Wright Corp.*, 724 F.2d at 234). Everyone loses in that scenario. Business, consumers, and the economy as a whole would suffer from that over-deterrence of pro-competitive vertical restraints.

The chilling effect of Petitioners' "more careful scrutiny" would be compounded by the uncertainty regarding how that new analysis would evolve as it was applied in particular cases. This Court has long "emphasiz[ed] the importance of clear rules in antitrust law," *Pac. Bell Tel. Co.*, 555 U.S. at 452, to ensure "business certainty and litigation efficiency," *Maricopa Cty. Med. Soc'y*, 457 U.S. at 343-344. Forging an aggressive new policy for non-collusive vertical restraints, as Petitioners advocate, would mark a sharp break from that policy and undo much of the progress antitrust law has made in developing well-defined, predictable rules.

Avoiding these harmful effects is precisely why this Court has long sought "to temper, limit, or overrule once strict prohibitions on vertical restraints." *Leegin*, 551 U.S. at 901. It should not change course by adopting Petitioners' approach now, especially when that project has proven successful in fostering a competitive economy with discernible boundaries for permissible conduct.

CONCLUSION

PhRMA respectfully requests that the judgment of the Court of Appeals be affirmed.

Respectfully submitted.

JOSEPH OSTOYICH
WILLIAM LAVERY
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 639-7700

AARON M. STREETT
Counsel of Record
J. MARK LITTLE
BAKER BOTTS L.L.P.
910 Louisiana St.
Houston, TX 77002
(713) 229-1234
aaron.streett@bakerbotts.com

Counsel for Amicus Curiae Pharmaceutical Research and Manufacturers of America

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In The Supreme Court of the United States

STATE OF OHIO, ET AL.,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR *AMICI CURIAE* J. GREGORY SIDAK AND ROBERT D. WILLIG IN SUPPORT OF RESPONDENTS

ROBERT M. LANGER*
AARON S. BAYER
BENJAMIN H. DIESSEL
JENNIFER A. MCTIERNAN
WIGGIN AND DANA LLP
20 Church Street
Hartford, CT 06103
(860) 297-3700
rlanger@wiggin.com
**Counsel of Record*

Counsel for Amici Curiae

January 23, 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTERESTS OF *AMICI CURIAE*

The *amici* are scholars on antitrust law and the economics of industrial organization whose writings the federal courts have approvingly cited on multiple occasions.[1] The *amici* filed a brief in the Second Circuit supporting American Express.[2] Portions of the Second Circuit's opinion track the arguments contained in that brief. The *amici* subsequently published an article based on their brief and their analysis of the Second Circuit's decision.[3]

J. Gregory Sidak is the founder and chairman of Criterion Economics, L.L.C. He has held the Ronald Coase Professorship of Law and Economics at Tilburg University in The Netherlands, the F.K. Weyerhaeuser Chair in Law and Economics at the American Enterprise

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[1] Pursuant to Rule 37(6), the *amici* certify that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici*, or their counsel, made a monetary contribution to the preparation or submission of this brief. The parties have given written consents to the filing of briefs *amicus curiae*. The *amici* file this brief solely as individuals and not on behalf of any institutions with which they are affiliated.

[2] Brief for *Amici Curiae* J. Gregory Sidak, Robert D. Willig, David J. Teece, and Keith N. Hylton Scholars and Experts in Antitrust Economics in Support of Defendants-Appellants and Supporting Reversal, *United States v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016) (No. 15-1672), 2015 WL 4873717.

[3] J. Gregory Sidak & Robert D. Willig, *Two-Sided Market Definition and Competitive Effects for Credit Cards After* United States v. American Express, 1 Criterion J. on Innovation 1301 (2016), *available at* https://www.criterioninnovation.com/articles/two-sided-markets-for-credit-cards/.

Institute for Public Policy Research, and academic positions at Yale University and Georgetown University. He served as deputy general counsel of the Federal Communications Commission, senior counsel and economist with the Council of Economic Advisers, and Judge Richard Posner's first clerk. He is a founding co-editor of the *Journal of Competition Law & Economics*, published quarterly by the Oxford University Press since 2005.

Robert D. Willig is Professor Emeritus of Economics and Public Affairs at the Woodrow Wilson School and at the economics department of Princeton University. He served in the Antitrust Division of the U.S. Department of Justice as Deputy Assistant Attorney General for economics. He is a co-editor of the *Handbook of Industrial Organization* and a fellow of the Econometric Society, and he has served on the editorial boards of the *American Economic Review*, the *Journal of Industrial Economics*, and the MIT Press series on regulation. He is a founder of and a senior consultant to Compass Lexecon L.L.C.

INTRODUCTION

In *United States v. American Express Company*, the United States and seventeen states brought antitrust claims against credit-card networks, including Visa, MasterCard, and American Express. *United States v. Am. Express Co.* (*Amex I*), 88 F. Supp. 3d 143, 149 (E.D.N.Y. 2015), *rev'd sub nom. United States v. Am.*

Express Co. (*Amex II*), 838 F.3d 179 (2d Cir. 2016), *cert. granted sub nom. Ohio v. Am. Express Co.* (*Amex III*), 2017 WL 2444673 (U.S. Oct. 16, 2017) (Mem.). Plaintiffs challenged the credit-card networks' use of "Non-Discrimination Provisions" (NDPs) that prohibit merchants from "steering" cardholders at the point of sale to a less expensive or otherwise merchant-preferred form of payment. *Amex I*, 88 F. Supp. 3d at 149-50. Plaintiffs alleged that the NDPs constituted an unreasonable restraint of trade in violation of section 1 of the Sherman Act, because the NDPs supposedly suppressed competition among rival credit-card networks by removing their incentives to reduce merchant discounts. *Id.* Visa and MasterCard each entered into a consent decree with Plaintiffs, pledging to eliminate NDPs from their agreements with merchants, but American Express proceeded to trial. *Id.* at 149.

The District Court found that American Express's use of NDPs violated section 1, and it permanently enjoined American Express from enforcing the NDPs. *Amex II*, 838 F.3d at 184. The Second Circuit reversed with instructions that judgment be entered for American Express. *Id.* at 207. The Second Circuit found that the District Court's "erroneous market definition" led to the incorrect conclusion that the NDPs had an anticompetitive effect on the relevant market. *Id.* at 204.

The United States and six of the seventeen plaintiff states are no longer parties. Petitioners consist of the eleven remaining plaintiff states. For the reasons explained below, this Court should reject Petitioners'

arguments, affirm the Second Circuit's decision, and endorse its reasoning.

SUMMARY OF THE ARGUMENT

Under the rule of reason, did Petitioners' purported showing that American Express's anti-steering provisions stifled just one of several forms of competition on the merchant side of the credit-card platform, without consideration of enhanced competition on the consumer side of the two-sided market, suffice to prove anticompetitive effects in a valid relevant market and thereby shift to American Express the burden of establishing any procompetitive benefits from the provisions? Economic analysis confirms that the Second Circuit correctly answered, "No." The principal issue before this Court – the one that separates the Second Circuit and District Court decisions – is whether challenged conduct in a two-sided market can properly be assessed ignoring its impacts on both sides of the market and ignoring the interactions of those impacts on one another.

NDPs enable networks to compete vigorously for cardholders with rewards and benefits that can be funded only with merchant fees. Although NDPs might stifle one form of competitive pressure on the networks due to their repression of steering, they stimulate more competitive pressure on the networks to persuade merchants to accept their cards with the balance of their fees, services, and the customers they attract. The

NDPs allow two-sided market participants to compete for both merchant acceptance and cardholders with *two-sided product differentiation* – higher or lower merchant fees, corresponding higher or lower cardholder benefits, and corresponding bigger-spending or smaller-spending total customers for the merchants. Without NDPs, individual merchants would be motivated to steer customers to the network with the lowest merchant fees, thereby disabling the two-sided product differentiation.

In the two-sided market, a credit-card network should be permitted under the antitrust laws to compete with a strategy that needs to restrict a merchant that accepts the card from discriminating against its use at the point of sale. To conclude otherwise, as Petitioners urge, would suppress product differentiation in this two-sided market. It would compel a would-be differentiated competitor to mimic the strategies of its rivals. And, by making rival credit-card networks more homogeneous in their service offerings, Petitioners' proposed interpretation of antitrust law would make the market for credit-card networks more vulnerable to collusion. Those perverse results would harm consumers in the name of advancing Petitioners' claim that they are supposedly protecting consumers.

This Court should affirm the Second Circuit's decision and endorse its reasoning. Doing so would recognize the economic and commercial realities of competition in the two-sided market for credit-card networks and better serve this Court's rationale for

having the rule of reason than would this Court's adoption of Petitioners' incorrect reasoning.

ARGUMENT

I. The Market for Credit-Card Networks Is Two-Sided.

A two-sided market involves two distinct groups of consumers. Network externalities exist between those two groups: the value that consumers on one side of the market derive from the consumption of the good or service increases with the number of consumers on the other side of the market.[4] To prosper in a two-sided market, a firm needs to compete against alternative platforms by appealing to both groups of consumers with optimally balanced prices and benefits for each side of the market, such that the firm achieves an optimal *aggregate* price posture.[5]

Like shopping malls, executive recruiting firms, computer operating systems, dating services, computer games, and social networking websites, credit-card networks exemplify two-sided platforms. A credit-card network facilitates the interaction between cardholders and merchants by performing various functions,

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[4] *See* Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. Eur. Econ. Ass'n 990, 990 (2003), *available at* https://www.jstor.org/stable/40005175?seq=1#.

[5] *Id.* ("Platform owners or sponsors in these industries must address the celebrated 'chicken-and-egg problem' and be careful to 'get both sides on board.'").

such as issuing credit cards, extending credit to cardholders, collecting amounts due, and paying retailers for their sales using the network's cards. The success of the credit-card network depends upon both cardholders and merchants mutually reinforcing widespread acceptance, based on both groups' benefits from their own utilization and acceptance of the credit card.

To maximize profit, a credit-card network must carefully allocate the aggregate price that it charges between cardholders and merchants. The aggregate price in a two-sided market equals the sum of the prices that each side of the market pays. By allocating a relatively small, or even negative, portion of the aggregate price to the cardholder and a relatively large portion to the merchant, a credit-card network encourages cardholders to use credit cards that belong to its network, which in turn increases a merchant's incentive to accept that network's credit cards. The merchants' widespread acceptance of the credit card in turn increases the credit card's appeal for cardholders. However, if the price that the credit-card network charges to merchants is too high, fewer merchants will accept the network's credit cards, and lower merchant acceptance of that network's cards will in turn decrease the appeal to cardholders of using those cards. Thus, network effects magnify the effect of a price change on one side of the two-sided market.[6] In other words, a credit-card network's allocation of the aggregate price between cardholders and merchants affects

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[6] *See* Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. Econ. 645, 648 (2006).

the total volume of transactions on that network (which is to say the network's output) and therefore the network's commercial success.

Competition among credit-card networks for the business of the cardholders and the merchants plays out on several dimensions: appeal of the cards and its services and rewards to potential cardholders; fees and services and the commerce of the cardholders that acceptance brings to the merchants; and the effectiveness of the network externalities that link merchants and cardholders that is driven by finding the right mixture of the terms offered to cardholders and merchants. A unilateral decision by a credit-card network to adopt NDPs does not suppress these dimensions of competition in their total effect.

Imagine that a particular brand of credit-card network offers cardholders expensive benefits and terms that are particularly appealing to big spenders. These spenders are particularly desirable retail customers, so some merchants are highly motivated to accept this brand of card so as to attract the business of these highly valued customers. Relatively high merchant fees are needed to fund the expensive cardholder benefits, and those cardholder benefits are worth it to many, but not all, retailers due to the commercially beneficial customers that acceptance of the card attracts. Nothing about this market scenario is counterproductive to consumer welfare, and of course other rival payment systems will offer different mixtures of prices and terms to the cardholders and merchants. The rival payment systems compete with each other

for merchant acceptance and for cardholders, and the dimensions of their competition include both cardholder benefits and merchant fees and services.

Now consider how this worthwhile variety of competitive systems' designs and features would be destroyed by prohibition of anti-steering contractual provisions. The high-rewards, big-spender cardholders would be attracted to a retailer that accepts their high-rewards card; but then, at the point of sale, the cardholders would be steered to use another payment system that is less expensive for the merchant. As a consequence of this market-wide, individually rational conduct, the funding for the high-rewards cards would disappear, either because steering would undermine use of the cards or because the network operator would need to reduce the merchant fees to stem the merchant steering.

The anti-steering provisions can enhance overall competition between credit-card networks for both cardholders and merchants by permitting and motivating networks to compete through product innovation that leads to two-sided product differentiation – rather than by constraining credit-card networks to compete solely through their merchant fees, as Petitioners urge. By permitting competition over this multidimensional space, anti-steering provisions can benefit both cardholders and merchants. Prohibiting them, in contrast, would suppress product innovation and beneficial avenues of competition and thus destroy any market equilibrium that included product differentiation. However, the District Court could have

discerned this overall effect of the anti-steering provisions only if it had first properly characterized the relevant market to include both sides of the two-sided market for credit-card networks. Conclusions drawn from a one-sided analysis would rely on a false economic characterization and thus be systematically wrong.

Economists have produced an extensive literature on two-sided markets. In a seminal article published in 1983, Stanford law-and-economics scholar William Baxter, then serving as Assistant Attorney General at the Antitrust Division, explained the two-sided nature of credit-card markets. *See* William F. Baxter, *Bank Interchange of Transactional Paper: Legal and Economic Perspectives*, 26 J.L. & Econ. 541 (1983), *available at* http://www.stern.nyu.edu/networks/phdcourse/Baxter_Bank_interchange_of_transactional_paper.pdf.[7] Since

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[7] Within the oral history of the Stanford economics department in the 1970s, the *amici* credit Professor James Rosse with first explaining to each of them (as his former students) the two-sided nature of the demand for newspapers. Rosse explained that, in an antitrust case in or before 1973, he had testified in defense of a newspaper that would not allow its paperboys [*sic*] to raise the price of the papers they sold due to the two-sided character of demand in the market – the newspaper cared about circulation for the sake of ad revenues in a way that the distributors did not. By 1979, one of the *amici* developed a formal model of network interconnection expanding upon the following proposition:

> [N]etwork externalities and interconnection are basic features of networks that create special complexities in the analyses of prices for network access – both that of final consumers and that of vendors of network services (henceforth called technical network access). These complexities, their interactions, and the consequent

the early 2000s, others (including Nobel laureate Jean Tirole) have expanded that literature.[8] Economists

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lessons for public interest network access prices are the focus of this paper.

Robert D. Willig, *The Theory of Network Access Pricing*, *in* Issues in Public Utility Regulation 109, 110 (MSU Public Utilities Papers, H.M. Trebing ed. 1979).

By the mid-1990s, when governments were debating how telecommunications network operators would be permitted to recover the costs of building and operating interactive broadband networks, economists influenced by the insights of Baxter and Rosse made similar arguments about the importance of two-sided platform demand for pricing that would maximize economic welfare. *See, e.g.*, Robert W. Crandall & J. Gregory Sidak, *Competition and Regulatory Policies for Interactive Broadband Networks*, 68 S. Cal. L. Rev. 1203, 1219-20 (1995) (paper commissioned by the Canadian Bureau of Competition) ("[T]he interests of advertisers are closely aligned with those of consumers of programming. . . . This commonality of interests arises from the fact that . . . the demand for interactive broadband services . . . is the vertical summation of two demand curves: the viewers' demand for programming and the advertisers' demand for audiences. As in the case of any multiproduct firm, the provider of interactive broadband services will likely have common fixed costs of production that are high relative to the incremental costs of programming or infrastructure deployment. Those common fixed costs are optimally distributed in inverse relation to the elasticity of demand. Access charges and usage charges can be borne either by the advertiser or the subscriber. If, however, the advertiser has the more price-inelastic demand, it is optimal from the perspective of economic efficiency for the advertiser to bear the disproportionate share of those costs.").

[8] *See, e.g.*, David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 Yale J. on Reg. 325 (2003); Rochet & Tirole, *Two-Sided Markets: A Progress Report*, *supra* note 6; Roberto Roson, *Two-Sided Markets: A Tentative Survey*, 4 Rev. Network Econ. 142 (2005); Mark Armstrong, *Competition in Two-Sided Markets*, 37 RAND J. Econ. 668 (2006); Andrei Hagiu, *Two-Sided Platforms: Product Variety and Pricing Structures*, 18 J.

now widely embrace the definition of Tirole and Jean-Charles Rochet that a multi-sided market is a market "in which one or several platforms enable interactions between end-users and try to get the two (or multiple) sides 'on board' by appropriately charging each side." Rochet & Tirole, *Two-Sided Markets: A Progress Report*, *supra* note 6, at 645.[9] Antitrust scholars have

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Econ. & Mgmt. Strategy 1011 (2009); Sujit Chakravorti & Roberto Roson, *Platform Competition in Two-Sided Markets: The Case of Payment Networks*, 5 Rev. Network Econ. 118 (2006); Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. Eur. Econ. Ass'n 990, 990-91 (2003); Marc Rysman, *The Economics of Two-Sided Markets*, 23 J. Econ. Persp. 125, 125-27 (2009).

[9] Rochet and Tirole clarify that a market is two-sided only if the volume of transactions between the end users on each side of the platform depends on the allocation of the aggregate price – the sum of the price that the platform charges each side. Rochet & Tirole, *Two-Sided Markets: A Progress Report*, *supra* note 6, at 648. When the Nobel Prize committee explained its reasons for honoring Tirole in 2014, it mentioned the newspaper example, much in the form that Rosse first explained the concept to the *amici* in the 1970s:

> [A]dvertisers might desire that there be many viewers or readers, whereas viewers and readers often prefer that there be few advertisers. As a result, prices that would be clearly anti-competitive in a one-sided market can be highly competitive in a two-sided market. For example, offering newspapers for free would be a sign of predatory pricing if the newspaper's only source of revenue came from readers, but may be entirely consistent with competitive pricing if advertising revenues are important. Because conventional tests for anti-competitive behavior are not applicable in platform markets, the work by Rochet and Tirole (2003) has had an immediate impact on competition policy (see Evans, 2009).

further applied the economic principles of two-sided markets to a variety of cases and regulatory policies.[10]

Scientific Background on the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2014, Jean Tirole: Market Power and Regulation, compiled by the Economic Sciences Prize Committee of the Royal Swedish Academy of Sciences 28 (Oct. 13, 2014), *available at* https://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2014/advanced-economicsciences2014.pdf (citing Rochet & Tirole, *Platform Competition in Two-Sided Markets*, *supra* note 4; David Evans, *Background Note*, *in* OECD, Policy Roundtables: Two-Sided Markets 23, DAF/COMP(2009)20).

The Nobel Prize committee also specifically mentioned the relevance of Tirole's work to understanding the two-sided character of credit-card networks:

> A concrete example of a two-sided market is given by credit-card networks (such as Visa, Mastercard, or American Express). The two sides of the market are the consumers and the retailers. If a certain credit-card company charges retailers a high transactions fee, a retailer might decide to not accept this card. This might, however, lead consumers who prefer this card to shop elsewhere. On the other hand, there is a positive feedback loop between merchant acceptance and consumer usage. In a pioneering article, Rochet and Tirole (2003) analyzed the equilibrium of this kind of two-sided market, and studied its welfare properties. The model was generalized in Rochet and Tirole (2006). Key questions addressed in these articles include the equilibrium pricing structure, and the extent to which consumers and retailers use more than one network ("multi-homing").

Id. at 27-28 (citing Rochet & Tirole, *Platform Competition in Two-Sided Markets*, *supra* note 4; Rochet & Tirole, *Two-Sided Markets: A Progress Report*, *supra* note 6).

[10] *See, e.g.*, Bryan Keating & Robert D. Willig, *Unilateral Effects*, *in* 1 The Oxford Handbook of International Antitrust Economics 466 (Roger D. Blair & D. Daniel Sokol eds., Oxford Univ. Press 2014); Lapo Filistrucchi, Tobias J. Klein & Thomas O. Michielsen, *Assessing Unilateral Merger Effects in a Two-Sided*

II. The Relevant Market Includes Both Sides of the Credit-Card Platform.

When defining the relevant product market, a court identifies the "products that have reasonable interchangeability" from the perspective of the relevant consumers of the defendant's product. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956). The purpose of the market-definition inquiry is "to identify the market participants and competitive pressures that restrain an individual firm's ability to raise prices or restrict output." *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 496 (2d Cir. 2004); *see also* U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 4 (2010).

In this case, the District Court said that it "must account for the two-sided features of the credit card industry. . . ." *Amex I*, 88

Market: An Application to the Dutch Daily Newspaper Market, 8 J. Competition L. & Econ. 297 (2012); Robert H. Bork & J. Gregory Sidak, *What Does the Chicago School Teach About Internet Search and the Antitrust Treatment of Google?*, 8 J. Competition L. & Econ. 663 (2012); Daniel F. Spulber, *Solving the Circular Conundrum: Communication and Coordination in Internet Markets*, 104 Nw. U. L. Rev. 537 (2010); David S. Evans & Richard Schmalensee, *Industrial Organization of Markets with Two-Sided Platforms*, 3 Competition Pol'y Int'l 150, 152 (2007); J. Gregory Sidak, *A Consumer-Welfare Approach to Network Neutrality Regulation of the Internet*, 2 J. Competition L. & Econ. 349 (2006); Hagiu, *Two-Sided Platforms: Product Variety and Pricing Structures*, *supra* note 8; David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 Colum. Bus. L. Rev. 667.

F. Supp. 3d at 174. That statement is correct as a matter of economics. However, the District Court then defined the relevant product market to be the market for "general purpose credit and charge card network services" *offered to merchants* – a market in which Visa, MasterCard, American Express, and Discover compete. *Id.* at 170, 172. It said that accounting for both the merchant side and cardholder side of the market would "take[ ] the concept of two-sidedness too far." *Id.* at 172. The District Court added that, because "the customer neither sees nor pays the additional cost when networks increase the price of network services to merchants (other than in the form of higher retail prices, which are paid by all consumers) . . . the customer cannot be expected to initiate substitution in the first instance." *Id.* at 177. It thus concluded that, "[n]otwithstanding the two-sidedness of the credit card industry, . . . the court finds inadequate cause to depart from . . . defin[ing] the relevant market by reference to network services, rather than transactions." *Id.* at 175.

As the Second Circuit correctly concluded, the District Court's definition of the relevant market was not economically sound. *Amex II*, 838 F.3d at 196-200. Because a change in demand or cost on one side of a two-sided market affects the level and relationship of prices on all sides of the market, one must account for both sides of a two-sided market when defining a relevant market.[11] The Second Circuit reasoned that

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[11] *See* Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, *supra* note 8, at 355; Rochet & Tirole, *Two-Sided*

correct application of the hypothetical monopolist test (HMT) in a two-sided market requires a court to determine whether a hypothetical profit-maximizing monopolist could profitably implement "a small but significant and non-transitory increase in price ('SSNIP')" on one side of the market, while accounting for the SSNIP's indirect impact on the other side of the market. *Id.* at 199-200.[12]

In contrast, the District Court presumed that any decrease in the quantity of network services that merchants demanded in response to a SSNIP would not be

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Markets: A Progress Report, *supra* note 6, at 648, 664-65; Filistrucchi, Klein & Michielsen, *supra* note 10, at 301-02.

[12] This case presents a "Cellophane fallacy" scenario, since the challenged practice by American Express is already in place. *See, e.g.*, Richard A. Posner, Antitrust Law 150-51 (2d ed. 2001) (explaining the Cellophane fallacy in market definition). One reaches different inferences about consumer substitution depending on where along the demand curve one evaluates the own-price elasticity of demand. The Cellophane fallacy arises if one evaluates consumer substitutes at the price associated with the challenged practice instead of the price absent that practice. If the challenged practice causes price to rise, then consumers will consider a wider range of possible substitutes for the defendant's product than they will at the price absent the practice. The economic fallacy inherent in that analysis is that the higher price makes the product of the firm imposing the challenged practice appear to be more price-constrained by substitute products than it would be at a lower price. So, in this case, the HMT test should not be predicated on a SSNIP applied to the current situation, with the challenged practice in place. Perhaps a court should apply a SSNIP in a hypothetical but-for world without the NDPs. Or, alternatively, the court could start from the real world and do a reverse SSNIP, which would ask what effect a small but significant and nontransitory *decrease* in the current price would have on demand.

large enough to render the price increase unprofitable. *Amex I*, 88 F. Supp. 3d at 179. However, it failed to consider the potential change in *cardholder* demand that the decreased merchant demand would stimulate. As the Second Circuit said, "[a] proper application of the HMT . . . would not have merely assumed that a decrease in quantity of network services demanded by merchants facing a SSNIP would be too small to render the accompanying price increase unprofitable." *Amex II*, 838 F.3d at 199-200. The proper analysis instead would have examined "the extent to which even a low level of merchant attrition might cause some cardholders to switch to alternative forms of payment." *Id.* at 200. Any cardholder attrition would generate "a feedback effect on merchant demand (and thus influence[ ] the price charged to merchants)." *Id.* Hence, the Second Circuit concluded, the district court had erred by "excluding the market for cardholders from [the] relevant market definition." *Id.* at 197. This conclusion rests on sound economic reasoning.

This Court's decision in *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992), is consistent with this economic understanding of two-sided platforms. *Kodak* involved the relationship between copiers and after-market parts and service, which the Court considered to be two products that can be, and often are, sold separately and at different times. *See id.* at 475-76 ("[I]t makes little sense to assume, in the absence of any evidentiary support, that equipment-purchasing decisions are based on an accurate assessment of the total cost of equipment, service, and parts

over the lifetime of the machine."). The Court nevertheless recognized that, if there were sufficient economic interrelatedness between pricing and demand in the after-market and the fore-market segments, then it would be appropriate to characterize the market as a single, unified market – which economists call a "total systems" market or a market in which competitive interaction is characterized by "systems rivalry."[13] In such a market, actions that might appear to be anticompetitive in one segment might promote competition in the other segment and therefore would not "run afoul of the antitrust laws." *Id.* at 478-79. Indeed, the Court expressly acknowledged that "[i]t may be that [Kodak's] parts, service, and equipment are components of one unified market, or that the equipment market does discipline the aftermarkets so that all three are priced competitively overall, or that any anticompetitive effects of Kodak's behavior are outweighed by its competitive effects," but the Court held that it could not draw those conclusions as a matter of law on summary judgment. *Id.* at 486.

This case is different. Here, the trial record amply demonstrated that the credit-card market is genuinely two-sided, with strong economic interrelatedness between the cardholder and the merchant sides of the market. Thus, this case is the converse of *Kodak*: the total systems – here, the rival credit-card network

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[13] *See, e.g.*, Janusz A. Ordover & Robert D. Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 Yale L.J. 8 (1981); J. Gregory Sidak, *Debunking Predatory Innovation*, 83 Colum. L. Rev. 1121 (1983).

platforms – are the participants in the relevant market for the total output created by those platforms, output that requires and affects the welfare of both cardholders and merchants.

By properly recognizing *Kodak*'s relevance on the matter of interrelatedness between the cardholder and the merchant sides of the market, the Court can use this case to clarify how to conduct competitive analysis of challenged practices in two-sided markets. When defining a relevant market, proper application of the HMT must capture the effects that a SSNIP would have on both sides of a two-sided market. A one-sided HMT in a two-sided market ignores the hypothetical monopolist's *total* or *net* price and therefore distorts the analysis of the effect that a SSNIP would have on a hypothetical monopolist's profits. Suppose that it would be profitable for a hypothetical monopolist of all credit cards to raise merchant fees by 5 or 10 percent of the current fees (or of the but-for fees), taking cardholder reactions into account. Even in this example, one could not conclude that the NDPs are anticompetitive in view of the harm to cardholders from their abolition. Consequently, a one-sided HMT is inadequate to characterize whether or not a market is two-sided.

Moreover, it may not be necessary to perform the HMT in the context of the two-sided platform here at all. The HMT is certainly the right tool to determine whether debit cards or cash or checks or Bitcoins compete with credit cards, as in a merger analysis or even in a predation analysis. But why does the HMT inform the issue raised by the District Court in this case –

whether the market is two-sided enough to necessitate taking the cardholder impact into account? Indeed, the HMT may be analytically superfluous to the characterization of two-sided markets such as at issue here. Consistent with the economic understanding of two-sided markets as articulated by Rochet and Tirole and by the Second Circuit's analysis, the assessment of conduct in a two-sided market straightforwardly asks whether the challenged practice harms competition in its total effects on both sides of the market, taking both sides as well as their interactions into account. *Amex II*, 838 F.3d at 199-200.

Thus, the market-characterization inquiry distills to the strength and degree of the links between the two sides of the platform: If the two sides are only weakly related, then the analysis will show that the impacts of a challenged practice on the directly affected side of the market will predominate. However, if the two sides are inextricably linked, as are the merchant and cardholder roles in credit-card networks, then it is doubtful that the District Court's superficially-direct-effects approach tells the relevant story, and defining the market to ignore, as it did, the two-sided effects may lead incorrectly to an economically harmful conclusion.

The assertion advanced by certain *amici* that courts are not competent to undertake this straightforward analysis to identify two-sided platforms thus

lacks credibility.[14] Two-sided platforms have highly visible and readily identifiable attributes, which this case illustrates. For instance, here two discrete groups of customers – merchants and consumers – interact to create a single unit of output: a credit-card transaction. The volume of the output that the two sides create depends directly on the allocation as well as the level of the aggregate price that American Express charges the two sides.

In short, the antitrust analysis of practices in a two-sided market cannot validly ignore one of the sides, and the correct two-sided-market analysis might or might not yield the same conclusion as would an invalid one-sided analysis.

III. Petitioners Needed but Failed to Prove That NDPs Have an Anticompetitive Effect Across the Totality of the Two-Sided Credit-Card Platform.

The Second Circuit correctly found that the District Court's "erroneous market definition" distorted its assessment of the net competitive effect that American Express's NDPs had on the relevant market. *Amex II*, 838 F.3d at 204. Although the District Court acknowledged that there was no evidence that the NDPs resulted in "higher two-sided price[s]," it found that Petitioners produced sufficient circumstantial

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[14] Brief for *Amici Curiae* 28 Professors of Antitrust Law as *Amici Curiae* Supporting Petitioners at 28-31 (Dec. 14, 2017) (No. 16-1454) [hereinafter 28 Professors' Br.].

evidence "to support the conclusion that the NDPs had anticompetitive effects on the market as a whole." *Id.* (quoting *Amex I*, 88 F. Supp. 3d at 215). The District Court found that the NDPs suppressed price competition on the merchant side of the market, and it found such evidence sufficient to satisfy Petitioners' initial burden to demonstrate anticompetitive effects in the relevant market. *Amex I*, 88 F. Supp. 3d at 215. However, as the Second Circuit observed, the correct analysis would focus on the NDPs' competitive effect in the relevant (two-sided) market as a whole, and not on price competition in only a subset of the relevant market (namely, the merchant side of the market). *Amex II*, 838 F.3d at 204-05.

Petitioners successfully argued in the District Court that, "[w]ith the NDPs in place, merchants lack any meaningful means of controlling their consumption of network services in response to changes in price. . . ." *Amex I*, 88 F. Supp. 3d at 207. In Petitioners' view, the NDPs prevented merchants from influencing their customers' payment choices, which allegedly diminished the incentive of American Express's competitors, Visa and MasterCard, to offer merchants lower discount fees. *Id.* at 207-08. Petitioners argued that, by decreasing the incentive for American Express and its competitors to compete by offering merchants a lower price, the use of NDPs decreased competition in the market for payment-card network services. *Id.* at 212. The District Court found that "[p]roof of anticompetitive harm to merchants, the primary consumers of

American Express's network services, is sufficient to discharge Plaintiffs' burden in this case." *Id.* at 208.

The Second Circuit correctly disagreed. From an economic perspective, NDPs might provide an important tool to foster interbrand competition among credit-card networks. As the Second Circuit observed, American Express could not have supplied its cardholders with the optimal level of cardholder benefits if merchants could discriminate by steering American Express's cardholders at the critical point of sale to a different form of payment. *Amex II*, 838 F.3d at 205-06. Merchant steering would reduce American Express's revenue from merchant discount fees, which American Express used to fund enhanced benefits to its cardholders. The Second Circuit observed that "[a] reduction in revenue that Amex earns from merchant fees may decrease the optimal level of cardholder benefits, which in turn may reduce the intensity of competition among payment-card networks on the cardholder side of the market." *Id.* at 205. Thus, the use of NDPs could actually *increase* competition among credit-card networks. The history of the NDPs' use suggests that, in fact, American Express executed those agreements with merchants to be able to compete more forcefully with other credit-card networks. *Id.* at 190-91.

It also bears emphasis that an NDP does not eliminate the incentives of rival credit-card networks to offer competitive lower prices to merchants. Even with an NDP in place, a credit-card network may offer its merchants a lower fee than its competitors do. The argument that NDPs undermine credit-card networks'

incentives to offer low merchant fees ignores the salient fact that a merchant might demur from acceptance of that card if the network charges fees that are too high. It is already the case that roughly one-third of merchants that accept credit cards refuse to accept American Express. *Id.* at 190. The probative significance of this fact for the proper evaluation of competitive effects in this case cannot be overstated, for it confirms that a merchant can switch from American Express's network to an acceptable alternative credit-card network if the merchant believes that American Express is charging excessive merchant fees. Because lower merchant acceptance of a network's card will decrease that card's appeal to cardholders, even with NDPs in place, credit-card networks have the incentive to offer competitive merchant fees.

Furthermore, even if one assumes that NDPs do decrease the credit-card networks' incentives to compete on the basis of price on the merchant side of the market, that evidence is insufficient to prove anticompetitive effects in the two-sided relevant market as a whole. A company might compete with its rivals on the basis of price, quality, or both. Antitrust law should not compel a firm to compete equally across every dimension of market rivalry. For example, the mere fact that a company unilaterally decides to compete with its rivals primarily on the basis of quality, rather than price, does not mean that consumer and economic welfare are diminished, and a legal policy to preclude such a choice of strategy would assuredly be harmful to consumer welfare. In a two-sided market, it is essential for

legal policy to allow competing providers to exercise their own unilateral judgments about what mixture of prices and terms to offer the customers on the two sides, because only competitive determination of such mixture or variety of mixtures can most reliably arrive at market outcomes that maximize output and best serve economic welfare.

In addition, Petitioners provided no valid economic justification for assuming that increased merchant fees resulted from decreased market competition. From an economic perspective, increased cardholder benefits are equivalent to decreased prices on the cardholder side of this two-sided market. Holding a platform's aggregate price constant, a decrease in the price for cardholders will by definition require an increase in price for merchants. Thus, evidence of increased merchant fees in itself yields inconclusive information about competition in the two-sided market for credit-card networks.

The aggregate price charged to both sides of the market, together with its optimal allocation between the two sides, is what drives total output in the credit-card industry. Thus, one must recognize the welfare gains on the cardholder side of the market alongside possible welfare losses (if any) on the merchant side of the market, so as to determine the effect of the NDPs in the relevant market as a whole. By entirely excluding one side of the two-sided market from its relevant product market, the District Court never could have analyzed correctly the NDPs' competitive effects in the market for credit-card networks. A valid economic

analysis of the NDPs' competitive effects would have been two-sided, accounting for both the effects on network services to merchants and the effects on credit-card services to cardholders.

Some *amici*, invoking an analogy to the *per se* treatment of horizontal price-fixing agreements, contend that this Court should not account for the procompetitive benefits across the entire credit-card platform. 28 Professors' Br. at 25. Their analogy is false and relies on incorrect economic reasoning. Unlike horizontal price fixing, which typically reduces consumer welfare, two-sided platforms of the sort at issue here are vertical in nature and have procompetitive attributes that this Court has said must be recognized. *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007) ("Vertical price restraints are to be judged according to the rule of reason."); *id.* at 882 ("Respected economic analysts . . . conclude that vertical price restraints can have procompetitive effects."); *see also* Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135, 157-58 (1984) ("[T]he rule of reason's application to vertical arrangements should err on the side of tolerance" because "[m]ost vertical arrangements are procompetitive.").

Even if this Court were to characterize the NDPs as horizontal restraints, they are plainly necessary (due to the two-sided nature of the market) for American Express's ability to offer differentiated products in the credit-card network market to both merchants and consumers. Therefore, if viewed as horizontal

restraints, the NDPs are properly analogized to blanket licenses or territorial exclusives that enable the creation of new and differentiated products that enhance consumer welfare. Such restraints are not subjected to *per se* analysis. *See, e.g.*, *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 9-10 (1979); *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 211-12, 221-23 (D.C. Cir. 1986) (Bork, J.).

IV. Some *Amici* Supporting Petitioners Wrongly Condemn the Second Circuit's Assignment of Burden.

Some *amici* supporting Petitioners contend that the Second Circuit "depar[ted] sharply from prior antitrust analyses" by holding that it was Petitioners' "burden to show that the Amex Restraints had an adverse net effect" on competition.[15] These *amici* are wrong. The Second Circuit correctly allocated the burden of proof under the rule of reason.

As the Second Circuit explained (and as Petitioners agree), courts applying the rule of reason typically employ a "three-step burden-shifting framework." *Amex II*, 838 F.3d at 194; *see also King Drug Co. of*

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[15] Brief for *Amici Curiae* John M. Connor, Martin Gaynor, Daniel McFadden, Roger Noll, Jeffrey M. Perloff, Joseph A. Stiglitz, Lawrence J. White, and Ralph A. Winter in Support of Petitioners at 5, 13 (Dec. 14, 2017) (No. 16-1454); *see also* Brief for *Amici Curiae* John M. Connor, Martin Gaynor, Daniel McFadden, Roger Noll, Jeffrey M. Perloff, Joseph A. Stiglitz, Lawrence J. White, and Ralph A. Winter in Support of Petitioners at 2, 8 (July 6, 2017) (No. 16-1454).

Florence, Inc. v. Smithkline Beecham Corp., 791 F.3d 388, 412 (3d Cir. 2015); *K.M.B. Warehouse Distrib., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127 (2d Cir. 1995); *Bhan v. NME Hosps.*, 929 F.2d 1404, 1413 (9th Cir. 1991). The plaintiff bears the initial burden of showing that the challenged agreement has an anticompetitive effect in the relevant market. *See, e.g., Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 830 (3d Cir. 2010); *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993); *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 718 (6th Cir. 2003); *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001); *Retina Assocs., P.A. v. S. Baptist Hosp. of Fl., Inc.*, 105 F.3d 1376, 1381-82 (11th Cir. 1997); *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993). If the plaintiff carries that burden, the burden shifts to the defendant to present procompetitive justifications for the challenged practice. *See, e.g., Bhan*, 929 F.2d at 1413. If the defendant carries that burden, the burden then reverts to the plaintiff to show either that the challenged practice is unnecessary to achieve those procompetitive effects or that the defendant can achieve the same procompetitive effects by less restrictive means. *Id.*; *Amex II*, 838 F.3d at 194-95. Only if the plaintiff carries its burden in the third step can the plaintiff possibly prevail. *Bhan*, 929 F.2d at 1413.

To carry their initial burden in this case, Petitioners needed to demonstrate that American Express's NDPs had an anticompetitive effect in the relevant two-sided market. However, as explained above,

Petitioners failed to carry that burden. Because Petitioners incorrectly defined the relevant market, they failed to analyze correctly the competitive pressures that constrain the ability of a credit-card platform like American Express to increase prices or restrict output. Consequently, Petitioners never proved that American Express's NDPs decreased competition in the market for credit-card networks. Because Petitioners provided no evidence of anticompetitive effects in the market for credit-card networks, it would be legal error to shift the burden to American Express to justify its business conduct.

Contrary to the arguments of the *amici* economists supporting Petitioners, the Second Circuit's finding was faithful to the lower federal courts' three-step burden-shifting framework under the rule of reason. Only if Petitioners had shown that the NDPs had an anticompetitive effect in the relevant market would the burden of proof have properly shifted to American Express to show a procompetitive justification for those restrictions. The two-sided nature of the credit-card platform should not be wrongly characterized to excuse Petitioners from their evidentiary obligation under the rule of reason to justify the shifting to American Express of the burden of proof regarding the benefits of its challenged business practice.

Again, *Kodak* is instructive. If a systems market is found to be the relevant market, due to consumers' reliance on the total cost of ownership in making their systems choices, there is no burden shift between a finding of foreclosure of competition in an aftermarket

and any positive effects in the total systems market. Instead, if the characterization analysis finds a systems market, then the plaintiff must carry the burden of showing anticompetitive effects in that systems market, not merely in a particular stage or segment of it.

This Court said in *Kodak* that, to the extent a firm's products are so interrelated that consumers make their purchasing choices based upon the total cost of the "system," the products may be understood to be "components of one unified market. . . ." *Kodak*, 504 U.S. at 478-79, 486. And, when the relevant market for antitrust purposes is a unified systems market, the positive total effects of the firm's challenged practice may be dispositive at the outset. This Court acknowledged that, to the extent a total systems market exists, a pricing strategy that limits competition in an aftermarket component but has an overall positive effect on the total systems market does not "run afoul of the antitrust laws." *Id.* at 478-79. The Court in *Kodak* concluded:

> In the end, of course, Kodak's arguments may prove to be correct. It may be that its parts, service, and equipment are components of one unified market, or that the equipment market does discipline the aftermarkets so that all three are priced competitively overall, or that any anticompetitive effects of Kodak's behavior are outweighed by its competitive effects. But we cannot reach these conclusions as a matter of law on a record this sparse.

> Accordingly, the judgment of the Court of Appeals denying summary judgment is affirmed.

Id. at 486. The Second Circuit's analysis of the relevant market in this case relied on a full trial record rather than the necessarily sparser record available when the summary judgment order in *Kodak* was appealed to this Court. Equipped with that fuller record, the Second Circuit's decision flows logically from this Court's discussion of unified markets in *Kodak*. Simply put, where the components of a market are inextricably linked (as is the case between the two sides of the market for credit-card networks, but was not found on summary judgment to be the case with respect to the components of Kodak's purported total systems market), it is necessary to account for the effects of a firm's behavior on the interconnected market as a whole. The District Court erred by refusing to account for the effects of American Express's NDPs on both sides of the two-sided market for credit-card networks. In reversing, the Second Circuit properly applied longstanding antitrust principles with an appropriate understanding of the realities of this inherently interconnected market.

CONCLUSION

For the foregoing reasons, this Court should affirm the Second Circuit's decision and endorse its reasoning.

Respectfully submitted,

ROBERT M. LANGER*
AARON S. BAYER
BENJAMIN H. DIESSEL
JENNIFER A. MCTIERNAN
WIGGIN AND DANA LLP
20 Church Street
Hartford, CT 06103
(860) 297-3700
rlanger@wiggin.com
**Counsel of Record*

Counsel for Amici Curiae

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IN THE

Supreme Court of the United States

STATES OF OHIO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MONTANA, RHODE ISLAND, UTAH, AND VERMONT,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, AND AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF 20 MERCHANTS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

DANIEL A. SASSE
DEBORAH E. ARBABI
CROWELL & MORING LLP
3 Park Plaza, 20th Floor
Irvine, CA 92614
(949) 263-8400

JORDAN L. LUDWIG
CROWELL & MORING LLP
515 S. Flower St., 40th Floor
Los Angeles, CA 90071
(213) 622-4750

GEORGE D. RUTTINGER
Counsel of Record
ANDREW I. GAVIL
CHARLES D. AUSTIN
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 624-2500
gruttinger@crowell.com

Counsel for Amici Curiae

LIST OF AMICI

AutoNation, Inc., Bally Total Fitness Corporation, Big Sur Waterbeds, Inc., BJ's Restaurants, Inc., Bridgestone Americas, Inc., Caleres, Inc., Crestline Hotels & Resorts, LLC, Denver Mattress Co., LLC, Festival Fun Parks, LLC (d/b/a Palace Entertainment), Ingram Micro Inc., Innovative Dining Group, LLC, Jack in the Box Inc., Luxottica Retail North America Inc., Office Depot, Inc., OfficeMax Incorporated, Public Storage, Sofa Mart, LLC, Staples, Inc., TKC Holdings, Inc. (f/k/a Centric Group, LLC), United Airlines, Inc.

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INTEREST OF AMICI CURIAE[1]

Amici are merchants of varying size who sell goods or services in diverse industries in all areas of the country. The thread that binds amici here is a strong one: each has first-hand knowledge of the anticompetitive effects of American Express's "Non-Discrimination Provisions," which prohibit merchants from informing their customers of the high cost of American Express's credit cards and of the availability of less-expensive alternatives. These provisions are therefore more fairly characterized as "anti-steering rules" because they substantially impede point-of-sale competition between American Express and its rivals.

As customers of American Express's network services for general purpose credit and charge cards ("GPCC"), amici are uniquely situated to assist this Court in understanding the anticompetitive effects of American Express's conduct and the pernicious impact the anti-steering rules have had on the business community and consumers. Those effects were fully supported by the district court's comprehensive factual findings and are further borne out by amici's day-to-day experience in the marketplace. Amici's interest is in seeing American Express's anticompetitive conduct permanently

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[1] Pursuant to this Court's Rule 37.6, amici state that no counsel representing a party authored this brief in whole or in part, and no person or entity other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), amici state that counsel of record for Petitioners and Respondents have consented to the filing of this brief.

enjoined, so that the competitive process of the marketplace—the unencumbered and informed interaction of merchants, consumers, and other providers of network services for GPCCs—can be the arbiter of the price of network services and the value of rival card networks, not American Express.

SUMMARY OF ARGUMENT

"The antitrust laws," this Court recently wrote, "declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market." *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1109 (2015). The anti-steering rules ("ASRs") that American Express has imposed upon its merchants, including amici, have not only undermined the free market—they have "broken" it. *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 210 (E.D.N.Y. 2015) (*American Express I*). Following a seven-week bench trial, the district court reached precisely this conclusion. Based on amici's experience as market participants, and the settled antitrust jurisprudence that the district court faithfully applied, this conclusion was unassailable: at the hands of American Express's ASRs, competition for GPCC network services has been virtually abolished.

But the Second Circuit reversed. Drawing principally on selective economic literature not previously relied upon by any court, the Second Circuit determined that the district court erred by failing to sufficiently account for the fact that American Express operates its business on a "two-sided platform." In reaching this decision, the Second Circuit strayed from fundamental antitrust

principles, ignored binding precedent from this Court, and failed to appropriately credit the factual findings of the district court. Amici respectfully request that this Court effectuate the Sherman Act's purpose—to "promote robust competition," *N.C. State Board of Dental Examiners*, 135 S. Ct. at 1109—and reverse this erroneous decision for at least the following reasons.

Most fundamentally, the Second Circuit misconstrued the government's theory of anticompetitive effects and disregarded the district court's findings concerning those effects. The district court concluded that the government had proven multiple *actual* anticompetitive effects flowing from the ASRs, including reducing interbrand competition among network service providers, increasing prices for both merchants and consumers, and deterring lower-cost entrants and innovation. The district court consequently found that merchants and consumers would be better off without the ASRs because an unrestrained competitive process would yield the best results for the marketplace.

The Second Circuit mostly ignored these factual findings of anticompetitive effects (while never concluding that they were clearly erroneous). Instead, the court proposed novel principles for applying the antitrust laws to business models involving two-sided platforms. In doing so, it redirected the focus of its antitrust inquiry away from the direct and substantial evidence of actual competitive harm to the relevant market, concluding that the district court erred by failing to include both sides of the platform in that market. This approach was legally unsupported and economically unsound.

With undisputed actual anticompetitive effects already established, the primacy the Second Circuit afforded the relevant market question was misguided. The foundation goal of the rule-of-reason inquiry under Section 1 of the Sherman Act is to ascertain the impact of a challenged practice on competition. *See Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 691 (1978). Anticompetitive effects can be demonstrated through direct or circumstantial evidence, and sometimes both. But as this Court has held, market definition is a "surrogate" for anticompetitive effects that relies on potential and prediction, and is not required when direct evidence of actual effects is present. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 108-10 (1984) [hereinafter "*NCAA*"]. As this Court stated in *Indiana Federation of Dentists*, "the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition." 476 U.S. at 460. The Second Circuit did not—and could not—dispute the adverse effects on competition for GPCC network services caused by the ASRs. Its shift of focus to market definition, therefore, was alone reversible error.

The Second Circuit further held that the government plaintiffs bore the burden of establishing a net harm to "*all* Amex consumers on both sides of the platform." *United States v. Am. Express Co.*, 838 F.3d 179, 205 (2d Cir. 2016) (*American Express II*). Even if the market *was* broadly defined to include both "sides" of the American Express platform—an unprecedented

approach to relevant market definition that amici oppose—the district court's findings of anticompetitive effects still support its conclusion that the ASRs unreasonably restrained competition. In other words, the direct evidence and circumstantial evidence were consistent and aligned, and both pointed in the direction of substantial harm to competition. This was true even if the correct measure was "net" harm to competition because of the district court's specific finding that all consumers were harmed in addition to all merchants, and that the harm to the merchants and their consumers was far in excess of any benefits realized by American Express's cardholders. The Second Circuit's intense focus on the American Express platform—as opposed to all merchants, all consumers, and the competitive process more generally—fails to appreciate the government's argument and the court's finding that the focal point of the harm here was to horizontal, interbrand competition. As this Court has repeatedly held, the protection of such competition is the paramount aim of the antitrust laws. The Second Circuit's decision, which would countenance the elimination of interbrand competition for network services, is inimical to that objective.

Just as troubling, the ASRs' restriction on the dissemination of truthful information further disrupts the competitive process by rendering it unresponsive to consumer preference. The Sherman Act—a "consumer welfare prescription"—cannot have contemplated such a result. *NCAA*, 468 U.S. at 107 (citation omitted).

The Second Circuit's approach to redefining the relevant market was equally flawed. Ignoring the intensely factual nature of the relevant market

inquiry and the settled legal principles that guide this factual determination, the Second Circuit concluded that the relevant market in this case must include both sides of the American Express platform. A relevant product market includes reasonably interchangeable products in terms of price, use, and quality. Amici—merchants—are consumers of American Express and its competitors' network services. Amici cannot substitute cardholder products and services for network services, and therefore, cardholder products and services cannot serve as a competitive constraint on network services—even if the two are complementary and interdependent. These products are therefore not in the same relevant market. The Second Circuit's decision to the contrary ignores these commercial realities and the district court's factual findings in favor of an abstract economic theory that is inconsistent with well-established principles of market definition that are used under Sections 1 and 2 of the Sherman Act, as well as Section 7 of the Clayton Act.

In its effects analysis flowing from the improperly redefined relevant market, the Second Circuit also recognized a defense long precluded by this Court's precedent. In arguing that the ASRs are needed to promote competition, American Express has effectively admitted both that it exercises market power on the merchant side of the platform and that its credit and charge cards cannot compete without the ASRs. The Second Circuit also recognizes as much, stating, "[t]he relief sought by the government in this case [enjoining the ASRs] could even increase market concentration by reducing Amex's share to Visa's and MasterCard's

benefit." *American Express II*, 838 F.3d at 204 n.51. But the antitrust laws are not intended to protect competitors or shield noncompetitive products from free-market competition, they are intended to protect that competition and accept its results. And in exonerating the ASRs, the Second Circuit placed the interests of a single firm and its preferred (and admittedly noncompetitive) business model above the competitive process. The district court correctly rejected this invitation; the Second Circuit did not.

The decision of the Second Circuit should be reversed.

ARGUMENT

I. THE SECOND CIRCUIT MISCONSTRUED THE GOVERNMENT'S THEORY OF ANTICOMPETITIVE EFFECTS AND ERRONEOUSLY FAILED TO CREDIT SUBSTANTIAL EVIDENCE OF THOSE EFFECTS.

While the Second Circuit's analysis centered largely on relevant market definition, amici wish to highlight the primacy of competitive effect. As this Court has observed in the context of Section 1, market analysis is secondary to the ultimate focus of any Sherman Act inquiry: whether there are adverse effects on competition. In the trial court, the government proved that the ASRs had *actual* anticompetitive effects: by preventing merchants from informing consumers of the true cost of using an American Express card, the ASRs extinguished any incentive on the part of network service providers to compete on price; diminished competition; discouraged entry and innovation; and facilitated horizontal anticompetitive effects. This

showing was sufficient to satisfy the government's burden. In redirecting the inquiry to the market analysis, the Second Circuit failed to adhere to this legal principle, misconstrued the government's posited theory of harm, and failed to properly credit the well-supported findings of the district court. As consumers of the network services affected by American Express's ASRs, amici are well-positioned to discuss the actual competitive harms established by the government.

A. The district court's findings that the government established actual anticompetitive effects were fully supported by the record evidence and are consistent with the real-world experience of amici.

Anticompetitive effects may be shown directly or indirectly. As the district court correctly observed, to prove anticompetitive effects directly, the plaintiff must show "'actual, sustained adverse effects on competition.'" *American Express I*, 88 F. Supp. 3d at 208 (quoting *Ind. Fed'n of Dentists*, 476 U.S. at 460-61). Alternatively, the plaintiff may prove harm to competition indirectly through circumstantial evidence showing market power in a relevant market and the anticompetitive nature of the restraint. *See id.* As this Court has previously observed, "[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction in output,' can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.'" *Ind. Fed'n of Dentists*, 476 U.S.

at 460-61 (quoting 7 Phillip Areeda, *Antitrust Law* ¶ 1511 at 429 (1986)). Following this Court's instruction, several circuit courts are in accord. *E.g.*, *Todd v. Exxon Corp.*, 275 F.3d 191, 206-07 (2d Cir. 2001) (Sotomayor, J.) (explaining that a plaintiff may avoid a "'detailed market analysis'" by offering proof of actual detrimental effects (citation omitted)); *Christy Sports, LLC v. Deer Valley Resort Co., Ltd.*, 555 F.3d 1188, 1198 (10th Cir. 2009) (noting in the Section 1 context that "allegation of actual anticompetitive effects obviates any need to allege a relevant market"). The principle has also been applied in the context of monopolization claims asserted under Section 2. *See, e.g.*, *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1016 (6th Cir. 1999) ("We find that although the plaintiffs failed to define the relevant market with precision and therefore failed to establish the defendants' monopoly power through circumstantial evidence, there does exist a genuine issue of material fact as to whether the plaintiffs' evidence shows direct evidence of monopoly, that is, actual control over prices or actual exclusion of competitors."); *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) ("More precisely, a firm is a monopolist if it can profitably raise prices substantially above the competitive level. Where evidence indicates that a firm has in fact profitably done so, the existence of monopoly power is clear." (citations omitted)).

The upshot of these decisions is that the primary function of the relevant market inquiry is to serve as a step in the chain of indirectly demonstrating injurious effects to competition. It is less important where, as here, the plaintiff produces direct evidence of actual anticompetitive harm. And it surely should

not take precedence to the point of substituting for evidence of actual competitive harm.

In its detailed factual findings, the district court found that the government proved *actual* detrimental effects on competition among the four credit and charge card networks—American Express, Visa, MasterCard, and Discover. *See American Express I*, 88 F. Supp. 3d at 207-24. Many of these key factual findings were largely uncontested by the Second Circuit, and in the Second Circuit's decision, not a single factual finding was deemed "clearly erroneous." Fed. R. Civ. P. 52(a)(6). The unchallenged anticompetitive effects proven by the government include the following:

1. The Second Circuit never questioned the district court's finding that "the challenged restraints impede a critical form of horizontal, interbrand competition." *American Express I*, 88 F. Supp. 3d at 212. The district court found that by restricting merchants' ability to steer customers to lower-priced networks, the ASRs disrupted the normal price-setting mechanisms in the marketplace. *Id.* at 209. Because "[s]teering is a lynchpin to inter-network competition on the basis of price," the ASRs prevent American Express's competitors from "increas[ing] sales or gain[ing] market share by offering merchants a more attractive price than [their] competitors." *Id.* at 210. Trial testimony established that "[o]nce you have acceptance at th[e] merchant, lowering your price . . . does not drive incremental sales." *Id.* In other words, "Amex's [ASRs] deny its competitors the ability to recognize a 'competitive reward' for offering merchants lower swipe fees, and thereby

suppress an important avenue of horizontal interbrand competition." *Id.*

The district court further noted that American Express's pricing strategy confirmed the harm to interbrand competition. At trial, American Express acknowledged the absence of price competition for merchant pricing in the network services market, and in setting prices American Express does not account for any downward pressure from the swipe fees its competitors charge. *Id.* Instead,

> Amex uses Visa's and MasterCard's rates as a floor when evaluating its own discount rate in various industries [and] similarly felt no pressure to lower their own prices or otherwise respond to Discover's efforts in the late 1990s to build its share in the network services market by offering merchants prices well below those charged by its competitors.

Id. American Express officials testified that it was not "anybody's business strategy [] to be cheaper than the next guy," and that "[w]e should not compete on costs with" Visa and MasterCard. *Id.* This evidence demonstrated that "American Express itself recognizes the absence of competition on the basis of merchant pricing in the network services market." *Id.*

Nowhere does the Second Circuit identify error in the district court's findings regarding American Express's pricing strategy and its stated view that competition on pricing of network services to merchants was non-existent. Nor did the Second Circuit find any error in the description of the

horizontal, interbrand harm in the network services market that was attributable to the ASRs.

2. The Second Circuit similarly did not question the evidence supporting the government's theory that the ASRs allowed *all four* networks to more easily (and profitably) raise their merchant discount fees, resulting in industry-wide higher prices to merchants. *Id.* at 215-16. This was because the ASRs prevented merchants from steering customers to lower-cost networks and transactions—something merchants would have done absent the restrictive provisions.[2] *Id.* at 215. The district court found that without affording merchants the ability to steer, American Express and its competitors' incentives to price compete on merchant fees was dampened. *Id.* at 224. Prices rose accordingly and continually over time. For instance, American Express was able to raise merchant discount rates repeatedly and profitably pursuant to its "Value Recapture" strategy while never losing a large merchant and losing only a few small merchants. *Id.* at 195, 215. Visa and MasterCard were also able to increase merchant fees by more than 20% from 1997 to 2009. And after the ASRs rendered its low-price strategy futile, Discover was able to "radically" increase its prices over a relatively short period of time to "match the rates set by its competitors." *Id.* at 216. These price increases were accomplished "with virtual impunity, relying on the restraining effect of the anti-steering rules." *Id.* These findings—none of which were

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[2] For example, trial testimony revealed that four major commercial airlines sought to modify or eliminate the ASRs to no avail. *Id.* at 219-21.

found to be clearly erroneous—established the undisputed price-raising and price-stabilizing effects of the ASRs.

The district court also found that consumers bore the brunt of these price increases. Obligated to pay higher per-transaction costs, merchants began increasing the prices of goods, thereby sharing the ASRs' economically-detrimental effects with consumers. *Id.* ("Merchants facing increased credit card acceptance costs will pass most, if not all, of their additional costs along to their customers in the form of higher retail prices."). The effect on consumers is especially profound for non-American Express cardholders, who could not have benefited from any alleged "benefits" created by American Express's cardholder reward programs:

> Even if American Express passed through every cent of its premium or the incremental revenue realized from its Value Recapture price increases to cardholders—which it does not—customers who do not carry or qualify for an Amex card are nonetheless subject to higher retail prices at the merchant, but do not receive any of the premium rewards or other benefits conferred by American Express on the cardholder side of its platform.

Id. American Express cardholders also paid these higher prices, as the American Express rewards programs did not mitigate the costs imposed on merchants and passed on through price increases. *See id.* (citing testimony establishing "that American

Express spends less than half of the discount fees it collects from merchants on cardholder rewards").

The Second Circuit mostly ignored the finding that merchants and consumers paid higher prices, asserting in a footnote (with no analysis or record support) that the district court erred by failing to account for offsetting rewards benefits. *American Express II*, 838 F.3d at 204 n.52. But as the passage above demonstrates, the district court did account for offsetting rewards—indeed, it even assumed that American Express cardholders received *greater* benefits than they in fact did. Nonetheless, the district court still found that the harm far exceeded any offsetting benefits to American Express cardholders. The Second Circuit ignored the plain import of the district court's finding—that is, any realized transfer of the higher merchant fees to American Express's rewards customers never could have fully eliminated the anticompetitive effects. This is because *all* consumers suffered from these effects in the form of higher prices, and only American Express's rewards customers had even the possibility of sharing in American Express's excess profits. The Second Circuit's rejection of this finding was therefore unsupportable.

3. Nor did the Second Circuit find error with the district court's finding that the ASRs blocked innovative, low-cost business models. Informed by the experience of Discover—the most recent entrant of the four major GPCC network providers—the district court found that the ASRs undermined low-cost business models that were used by Discover (and could be used by other new market entrants). Entering the network services market in 1985, "Discover saw an opportunity to leverage its position

as the lowest-priced network to gain share." *American Express I*, 88 F. Supp. 3d at 213. The company engaged in a "very aggressive[]" pricing strategy, with "all-in discount rates significantly below those of its competitors." *Id.*

But industry ASRs proved to be an insurmountable hurdle to capturing market share. The district court found that because of the ASRs, "Discover's efforts . . . failed to produce []any significant movement" in market share. *Id.* at 213-14. The ASRs "denied merchants the ability to express a preference for Discover [to their customers] or to employ any other tool by which they might steer share to Discover's lower priced network." *Id.* at 214.

Unable to compete on price, Discover eventually raised its prices for network services—nearly 24%—to levels similar to those charged by American Express, Visa, and MasterCard. *Id.* The district court described this increase as the result of Discover "[r]ecognizing that its lower prices would not drive incremental volume to its network in a market subject to limitations on merchant steering." *Id.* As one Discover witness testified, because of the ASRs, lower price did not drive incremental sales, so "offering a lower price . . . was leaving money on the table," and providing merchants a "discount without getting anything in return didn't make any business sense." *Id.* With interbrand price competition for network services eliminated, Discover's incentive to offer lower prices was squelched, and it was forced to abandon its low-cost model and instead adopt "prices . . . similar to those offered by Visa and MasterCard" as well as "the more complicated 'unbundled' pricing model used by those networks." *Id.* These findings

again underscore the soundness of the government's theory as to how the ASRs resulted in horizontal price stabilization, a theory that was entirely supported by the record.

The district court concluded that Discover's change in business strategy—along with all developments leading it—was "emblematic of the harm done to the competitive process by Amex's rules against merchant steering." *Id.* The Second Circuit neither identified any error in these findings nor disputed the reality of how ASRs prevented Discover from implementing its lower-price strategy. In fact, the Second Circuit was silent on most of these facts. The Second Circuit's sole comment on these findings was related to its departure from its earlier decision in *United States v. Visa U.S.A.*, 344 F.3d 229 (2d Cir. 2003), and its insistence that the two-sided platform required consideration of more than just the effect on the merchants. But the Second Circuit never disputed the detrimental effect on merchants and their consumers in the form of higher prices, and on both entry and innovation.

4. Given the conclusion that ASRs harm both merchants and consumers in the manner described above, it is hardly surprising the district court found that removing the provisions would benefit both merchants and consumers. *See id.* at 218-24.

Without the ASRs, network providers could engage in a wide variety of price and non-price competition at the merchant level. Merchants would be able to "direct a greater share of their charge volume to lower-cost credit or charge card networks, whether by offering discounts to customers for using such cards, posting the relative costs of different

modes of payment, or engaging in another form of point-of-sale steering." *Id.* at 219. Such competition would help restore "downward competitive pressure on merchant prices . . . result[ing] in lower swipe fees charged to merchants." *Id.*

The district court also found that removing the ASRs would provide consumers with multiple benefits. Lower merchant fees—as a result of downward pressure—would, in turn, lower prices paid by consumers for goods and services across the board. *Id.* at 221 ("In the longer term, the court expects that merchants will pass along some amount of the savings associated with declining swipe fees to their customers in the form of lower retail prices."). Consumers may also benefit from the immediate impact of steering. For example, merchants could offer point-of-sale discounts, free shipping for transactions, or free lodging in return for using the merchant's preferred credit card. *Id.* at 220. And without the ASRs, cardholders could be more informed about the costs of using one payment network instead of another. Aware of the "true cost" of their payment method, cardholders could then weigh whether the issuer's benefits to the cardholder (e.g., American Express cardholder rewards) "[w]ere of greater value than the discount, in-kind perk, or other benefit offered by the merchant." *Id.* at 220. The customer who values American Express's rewards may choose to forgo a point-of-sale discount of what the cardholder perceives as a lesser value. Another cardholder may find the free shipping to be a greater value than American Express's rewards for that particular transaction. This dynamic would, in turn, jump start competition among card issuers—they could increase the value of their cardholder

rewards or, to facilitate greater point-of-sale discounts or perks, decrease merchant fees in an effort to match or exceed the benefits that competing issuers provide. *See id.* at 213 ("Discover representatives also met with a number of larger merchants to offer discounts from the network's already lower prices if they would steer customers to Discover."). Different structures may appeal to different consumers. But the ASRs inhibit the ability of merchants, card issuers, and networks to compete on any terms other than those American Express prefers.

The Second Circuit did not hold that any of the above *factual* findings was clearly erroneous, concluding instead as a *legal* matter that "[t]he District Court's erroneous market definition caused its anticompetitive effects finding to come up short, for it failed to consider the two-sided net price accounting for the effects of the NDPs on both merchants and cardholders." *American Express II*, 838 F.3d at 204. But in the face of compelling evidence of substantial anticompetitive effects, the Second Circuit strayed from the ultimate purpose of the analysis of any Sherman Act claim—determining anticompetitive harm. By instead reverting to, and placing such a heavy, outcome-determinative focus on, market definition as opposed to the effects analysis, the Second Circuit ignored the well-established and long-standing precedents of this Court and others, committing reversible error.

B. The Second Circuit failed to appreciate the horizontal, interbrand character of the anticompetitive effects of the restraint.

In attempting to distinguish the Second Circuit's prior—and correct—decision regarding the relevant market in *Visa*, the Second Circuit demonstrated its fundamental misunderstanding of the nature of the competitive harm established in this case. More specifically, the Second Circuit attempted to distinguish the relevant market analysis in *Visa* on the basis that the restraints there were horizontal, while the restraints here are vertical. *American Express II*, 838 F.3d at 197-98. In making this distinction, the court failed to recognize the relation between the vertical conduct at issue (the ASRs) and the horizontal harm (elimination of competition among the four networks for network services). The Second Circuit wrote, "[u]nlike the contested conduct in this case, the contested conduct in *Visa* occurred not among different sides of the same network platform, but rather between the platforms themselves" and that "the *Visa* panel conducted a rule-of-reason analysis to determine whether *horizontal* restraints were inhibiting competition on one particular *level* of competition contained within a two-sided platform." *Id.* at 198.

But as this Court has noted, regardless of the form the restraint may take, "all anticompetitive effects are by definition horizontal effects." *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 n.4 (1988); *see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 892-94 (2007) (noting that vertical restraints may be used to facilitate a cartel or exclude rivals and new

entrants—both horizontal harms). And, as discussed above, that is precisely what the district court found here: that the ASRs "suppress [American Express's] network competitors' incentive to offer lower prices . . . vitiating an important source of downward pressure on Defendants' merchant pricing, and resulting in higher profit-maximizing prices across the network services market." *American Express I*, 88 F. Supp. 3d at 209. In other words, the ASRs thwarted horizontal competition among the networks—just as in *Visa*—notwithstanding that the ASRs can be characterized as "vertical" conduct. Consequently, the particular nature of the restraint in *Visa* is of no moment to the effects analysis here—the horizontal, interbrand nature of the harm is the same.

In disregarding the trial court's findings, the Second Circuit also did not sufficiently heed this Court's instruction that the primary purpose of the antitrust laws is to protect and promote interbrand competition. This Court has recently reaffirmed that "[t]he promotion of interbrand competition is important because 'the primary purpose of the antitrust laws is to protect [this type of] competition.'" *Leegin*, 551 U.S. at 890 (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997)). The district court plainly found that the ASRs harmed interbrand competition, *American Express I*, 88 F. Supp. 3d at 208-12, yet the Second Circuit wholly failed to grapple with this critical finding, focusing instead on the two sides of the American Express platform alone. The Second Circuit wrote, "[b]ecause the NDPs affect competition for cardholders as well as merchants, the Plaintiffs' initial burden was to show that the NDPs made *all Amex consumers* on

both sides of the platform—*i.e.*, both merchants and cardholders—worse off overall." *American Express II*, 838 F.3d at 205 (second emphasis added). In so holding, the Second Circuit misconstrued the true harm of the ASRs: the reduction—or eradication—of horizontal, interbrand competition among the networks. And, as discussed, this reduction in interbrand competition resulted in prices to merchants being raised and stabilized industrywide, a cartel-like result similar to that challenged in *Visa*. *See also United States v. Apple Inc.*, 791 F.3d 290, 320 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1376 (2016) (noting that vertical "most favored nation" clauses, while proper in many contexts, can "'facilitate anticompetitive horizontal coordination'" (quoting Jonathan B. Baker, *Vertical Restraints with Horizontal Consequences: Competitive Effects of Most-Favored-Customer Clauses*, 64 Antitrust L.J. 517, 520-21 (1996))).

None of this is inconsistent with the line of cases cited by the Second Circuit stating that a plaintiff must establish an adverse effect on competition "as a whole" in the relevant market, which the Second Circuit misinterpreted as requiring evidence of adverse effects on both sides of a two-sided platform. *E.g.*, *American Express II*, 838 F.3d at 194, 204. The Second Circuit misread these cases, which have nothing to do with two-sided platforms and merely state that antitrust plaintiffs must demonstrate harm to *competition* as opposed to harm just to competitors. *E.g.*, *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127 (2d Cir. 1995) ("The district court in this case concluded that KMB failed to meet its initial burden of showing 'an actual adverse effect on competition as a whole in the

relevant market.' In order to fulfill this requirement, the plaintiff must show more than just that he was harmed by defendants' conduct."). This is simply a restatement of this Court's axiom that "[t]he antitrust laws . . . were enacted for 'the protection of competition not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). The district court's finding of harm to interbrand competition, rather than to any particular competitor, is in complete harmony with these cases.

But in any event, the Second Circuit's decision misreads and misapplies the rule articulated in *K.M.B.* because it focused exclusively on American Express cardholders and merchants that accept American Express, rather than the market "as a whole"—that is, *all* merchants and *all* consumers. The decision concludes, "Plaintiffs bore the burden in this case to prove net harm to *Amex consumers* as a whole. . . ." *American Express II*, 838 F.3d at 206 (emphasis added). Again, the Second Circuit overlooked the higher prices to *all* merchants and *all* consumers resulting from lack of competition in the network services market due to the ASRs. *American Express I*, 88 F. Supp. 3d at 218 ("Plaintiffs have proven . . . [that removing the NDPs] will inure to the benefit of both merchants and customers alike."). In short, the district court found that competition "as a whole," as opposed to just American Express customers, was injured.

C. Restricting the ability of merchants to steer by sharing truthful information about costs disrupts the competitive process and renders the market unresponsive to consumer demand.

One of the key findings of the district court was that the ASRs harmed interbrand competition through "disrupt[ing] the normal price-setting mechanism by reinforcing an asymmetry of information between the two sides of the payment card platform." *Id.* at 209. Other than summarizing the ASRs in the very first paragraph of the decision, *American Express II*, 838 F.3d at 184, the Second Circuit fails to mention this fact again throughout its decision. As Professor Hovenkamp correctly remarks, American Express's interdiction on allowing merchants to provide truthful information to consumers prevents *competition*—as opposed to American Express—from "choos[ing] the optimal mix of revenue between the two sides" of American Express's business. Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 562(e) (Supp. 2017). As the precedent of this Court and others dictate, this result is antithetical to the purposes of the antitrust laws.

In *Professional Engineers*, this Court found unlawful an agreement among competitors not to discuss prices with potential customers until after negotiations had resulted in the initial selection of an engineer. 435 U.S. at 692. The basis for this conclusion was that the restraint impeded "'the ordinary give and take of the marketplace,' and substantially depriv[ed] the customer of 'the ability to utilize and compare prices in selecting engineering services.'" *Id.* at 692-93 (citation

omitted). Likewise, in *Indiana Federation of Dentists*, this Court wrote that an "effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market." 476 U.S. at 461-62. So, too, did the Sixth Circuit find unlawful a policy that "prohibited information about exclusive agency and other nontraditional listings . . . from being distributed to public real-estate advertising websites." *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 819 (6th Cir. 2011). There, the court found that the restrictions on the dissemination of truthful information about lower-priced and innovative competitive alternatives available to consumers "'hinder[ed] the competitive process.'" *Id.* at 829. In all of these cases, the courts recognized that depriving consumers of commercially valuable information fractures the price-setting mechanism that would prevail in a competitive marketplace. *Cf. Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) (concluding that New York's no-surcharge law regulated commercial speech, and remanding to the Second Circuit for consideration of whether this violated the First Amendment). The same is true here.

From an antitrust perspective, the problem of interfering with price-setting mechanisms is clear because such interference renders markets unresponsive to consumer preferences. This Court has concluded that where the "price structure . . . is unresponsive to [consumer] demand and unrelated to the prices that would prevail in a competitive market," the "anticompetitive consequences of [the]

arrangement are apparent." *NCAA*, 468 U.S. at 106-07. Indeed, the First Circuit has gone so far as to say "that overall consumer preferences in setting output and prices is more important than higher prices and lower output, *per se*, in determining whether there has been an injury to competition." *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1101 (1st Cir. 1994).

The impact on consumer preferences here—on both sides of the platform—is similarly apparent. On the merchant side, merchants cannot "inject price competition into the network services industry by encouraging their customers to use their lowest cost supplier, as they can in other aspects of their businesses." *American Express I*, 88 F. Supp. 3d at 210. On the consumer side, the interference may be even more substantial because American Express cardholders and all other consumers—cardholders and cash payers alike—may not be provided with *any* information about the true costs of their chosen payment methods and are therefore unable to make informed decisions. This is a direct intrusion on the allocative efficiency that free-market competition is intended to enable. Were the ASRs eliminated, all consumers could knowledgeably weigh the benefits of American Express's cardholder rewards against steering inducements offered by merchants to use lower-cost methods of payment. *See id.* at 220. This is the way the competitive process is supposed to function, but because of the ASRs, that aim has been thwarted.

Rather than allowing the competitive process to play out, American Express and the Second Circuit have substituted their views about the value of a specific business model for that of unfettered

competition. And this business model relies on the exercise of market power on the merchant side of the platform to extract the resources needed to subsidize what appears to be an otherwise noncompetitive credit or charge card to consumers on the other side of the platform—in dereliction of well-accepted antitrust analysis. As discussed in more detail below in Part III, this argument amounts to an impermissible defense that American Express's products could not withstand the process of competition absent competitive restraint. *See Prof'l Engineers*, 435 U.S. at 696.

II. THE SECOND CIRCUIT'S UNPRECEDENTED TREATMENT OF THE RELEVANT MARKET ANALYSIS FORSAKES CORE ANTITRUST PRINCIPLES.

While amici do not wish to repeat at length arguments made by Petitioners, the United States, and other amici who have addressed in detail the Second Circuit's glaring error in addressing the issue of relevant product market definition, amici do strongly support the assertion that the Second Circuit's treatment of that question was erroneous. The Second Circuit's entire opinion hinges on the flawed premise that the two sides of the American Express platform—that is, American Express's chosen business model—must be collapsed into a single relevant market. Specifically, the Second Circuit concluded that the district court erred because it "expressly declined 'to define the relevant product market to encompass the entire multi-sided platform.'" *American Express II*, 838 F.3d at 200 (quoting *American Express I*, 88 F. Supp. 3d at 174). The basis for this opinion is that "the price charged

to merchants necessarily affects cardholder demand, which in turn has a feedback effect on merchant demand (and thus influences the price charged to merchants)." *Id.* This conclusion disregards the district court's careful factual findings without determining them to be clearly erroneous and departs from economically sound and settled legal principles governing relevant market definition. It also demonstrates the Second Circuit's lack of appreciation for the interdependence of evidence of actual competitive harm and market definition. In showing that merchants had no alternative but to pay higher network service prices, the evidence of harm supported the district court's market definition.

To begin, the term "relevant market" is not an economic term; rather, it is a term of art with a legal definition. Even two of the economists upon whom the Second Circuit heavily relied acknowledge this: "We try to avoid the term 'two-sided market' because the word 'market' is a term of art for competition policy." David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 Colum. Bus. L. Rev. 667, 672 (2005). A relevant market contains both a product and a geographic dimension, but only the former is at issue here. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). For purposes of antitrust law, product interchangeability is confined to reasonable substitutes in terms of price, use, and quality. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956).

"Interchangeability of use and cross-elasticity of demand are not to be used to obscure competition but to 'recognize competition where, in fact, competition exists.'" *United States v. Cont'l Can Co.*, 378 U.S. 441, 452 (1964) (quoting *Brown Shoe*, 370 U.S. at 326).

The Second Circuit's approach also confirms its lack of appreciation for the purpose of market definition in antitrust analysis and its relationship to proving anticompetitive effects. Defining a relevant market and assessing market power can provide a basis for inferring anticompetitive effects. The inquiry thus focuses on the substitutes available to consumers to determine whether they will have alternatives in the event of a price increase. IIB Areeda & Hovenkamp, *supra*, ¶565b n.8 (4th ed. 2013) ("[T]he relevant question [for purposes of defining a relevant market] is . . . whether the competition in one product effectively constrains prices of the other product to the competitive level."). The court erred when it relied on literature intended to describe the features of the two-sided platform as a business model, and veered from these principles, which guide antitrust market definition.

Defining the boundaries of a relevant market often is an intensely factual inquiry, and has long been held as such. Nearly 60 years ago, the Court observed that "Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one." *Brown Shoe*, 370 U.S. at 336. More recently, the Court again affirmed that "[t]he proper market definition . . . can be determined only after a factual inquiry into the 'commercial realities' faced by consumers." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504

U.S. 451, 482 (1992) (citation omitted); *accord Todd*, 275 F.3d at 199 ("[M]arket definition is a deeply fact-intensive inquiry[.]"). The Second Circuit itself recognized this. *American Express II*, 838 F.3d at 196-97. Yet, the Second Circuit nevertheless chose to displace the factual finding of the district court that GPCC network services constituted a relevant market with its own conclusion that there is a single, "two-sided" relevant market. Again, this conclusion finds support in neither the factual record nor antitrust law.

The district court carefully examined the proper relevant market and concluded that the product market was GPCC network services. *American Express I*, 88 F. Supp. 3d at 170. Considering the facts and guiding legal principles, the district court rejected American Express's argument that the market should be defined as "transactions," finding that the government had "appropriately accounted for the two-sided features and competitive realities that affect the four major firms operating in the GPCC card network services market . . . and that a practical and nuanced application of the standard tools for defining product markets establishes that Plaintiffs' proposed definition is an appropriate underpinning for the court's analysis in this case." *Id.* at 171. Notably, American Express's own executive's testimony established that American Express views itself as competing in three separate businesses: as an issuing bank, as a merchant acquirer, and as a network. *Id.* at 173.

The services provided to cardholders by the card issuers (American Express, Discover, and the other card-issuing institutions) are not an interchangeable product with the GPCC network services (provided

by American Express, Visa, MasterCard, and Discover) of which amici are consumers. More specifically, in the GPCC network services market, Visa, MasterCard, American Express, and Discover sell network services that facilitate and process payment to merchants, who pay a fee to the network services provider that in turn facilitates the customer's purchase with a card. *American Express I*, 88 F. Supp. 3d at 150. In the card issuance market, on the other hand, American Express, Discover, and thousands of Visa- and MasterCard-issuing banks compete to acquire new cardholders by offering co-branded deals, signing corporate card clients, and offering rewards and other benefits that are intended to get consumers to spend on a specific card. *Id.* at 229.

"Products will be considered to be reasonably interchangeable if consumers treat them as 'acceptable substitutes.'" *PepsiCo., Inc. v. Coca-Cola Co.*, 315 F.3d 101, 105 (2d Cir. 2002); *see also Microsoft*, 253 F.3d at 52 ("[T]he relevant market must include all products 'reasonably interchangeable by consumers for the same purposes.'" (citation omitted)). Amici—a group of diverse merchants—cannot substitute GPCCs issued to cardholders for network services. And amici cannot use cardholder services as bargaining leverage or as a competitive constraint on the price of network services. Simply put, network services and cardholder services are not substitutes in terms of price, use, or quality; they are separate products, with completely different purposes and consumers. Cardholder services therefore do not represent a constraint on the ability of network services

providers to raise price, as the record here amply demonstrated.

These factual findings should have been reviewed under the clearly erroneous standard. *See* Fed. R. Civ. P. 52(a)(6). They were not. Yet, the Second Circuit concluded as a legal matter that the district court "erred in excluding the market for cardholders from its relevant market definition." *American Express II*, 838 F.3d at 197. But the Second Circuit's conclusion that the "market for cardholders" was improperly excluded from the relevant product market was neither made with any reference to the record evidence nor tethered to the established test for defining a relevant product market: product interchangeability based on price, use, and quality. *du Pont*, 351 U.S. at 404.

Further, a special legal rule is not required for American Express's business model—a "two-sided platform"—or any other business model that aims to generate revenue from different sets of consumers. As this Court has held, "[t]he 'market' which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. *The tests are constant.* That market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use, and qualities considered." *du Pont*, 351 U.S. at 404 (emphasis added). Indeed, when confronted with a two-sided business model in the past, this Court did not depart from ordinary rules of relevant market definition. *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 610 (1953). Yet, without citing or distinguishing *Times-Picayune*, the Second Circuit completely abandoned these considerations and adopted a new test for

firms that elect to conduct their business on a multi-sided platform. This was error.

The district court correctly concluded that American Express's decision to compete in multiple businesses should not guide the analysis and that the relevant market can be determined only after a factual inquiry into the commercial realities faced by consumers. As amici well know, that reality does not include using cardholder services as a substitute for network services.

III. IMPAIRING THE COMPETITIVE PROCESS TO AID AN OTHERWISE UNCOMPETITIVE FIRM IS NOT A COGNIZABLE PROCOMPETITIVE JUSTIFICATION.

The government convincingly established at trial that the ASRs were anticompetitive. This fulfilled the government's burden of establishing its claim and shifted the burden to American Express to justify its use of the ASRs. *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 507 (2d Cir. 2004) ("If the plaintiffs satisfy their initial burden, the burden shifts to the defendants to offer evidence of the pro-competitive effects of their agreement."); *see also Ind. Fed'n of Dentists*, 476 U.S. at 459 ("Absent some countervailing procompetitive virtue . . . an agreement limiting consumer choice by impeding the 'ordinary give and take of the market place' . . . cannot be sustained under the Rule of Reason." (citations omitted)). American Express did not do so, and the district court was correct in rejecting the proffered justifications for the ASRs. Similarly, although it was not framed as a "procompetitive justification" in the decision, the

Second Circuit mistakenly endorsed a principle that has been consistently rejected by the courts: a benefit to one group of consumers (cardholders) cannot justify harm to another (merchants and their customers), simply because on some reckoning of the aggregate effects there is no "net" harm between the two groups of consumers. This view flouts long-established precedent and should be rejected.

In an effort to justify its ASRs, American Express argued that "were the network unable to rely on the NDPs to control merchants' conduct toward its cardholders at the point of sale, the company's ability to pursue its differentiated business model would be invariably and irreparably harmed." *American Express I*, 88 F. Supp. 3d at 225. American Express's position essentially reduces to the following: (1) absent the ASRs, American Express's preferred business model could not survive; (2) with the ASRs, American Express is able to eliminate price competition for network services and raise merchant fees; and (3) American Express can then use some of the additional profits it extracts from merchants and their customers to make its cards more competitive in the card issuance market. *See id.* at 225-27. The district court rejected this "defense." And rightly so. American Express's argument essentially concedes both that the purpose of the ASRs is anticompetitive—that is, to eliminate competition in the network services market—and that its cards are themselves uncompetitive. From this, American Express concludes that it can compete on the terms it prefers (for cardholders) to best advance its business model. This is not a cognizable defense. *See McWane, Inc. v. FTC*, 783 F.3d 814, 841 (11th Cir. 2015), *cert. denied*,

136 S. Ct. 1452 (2016) ("'[C]ognizable justifications are typically those that reduce cost, increase output or improve product quality, service, or innovation.'" (citation omitted)); *cf.* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010) ("Cognizable efficiencies . . . do not arise from anticompetitive reductions in output or service."). It is not based on any efficiency, as would be true of a reduction in cost, or on a legitimate effort to solve for a market imperfection. To the contrary, it is inimical to the purposes of the Sherman Act.

This Court has squarely held that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Prof'l Engineers*, 435 U.S. at 696. In *Professional Engineers*, this Court sternly rejected the proffered justification that a restraint on competitive bidding would promote competition by enhancing public safety and the ethics of the profession. *Id.* at 695. The Court again rejected such a defense in *NCAA*. The NCAA argued that improving the quality of an uncompetitive product could justify an anticompetitive price or output restraint. But the Court responded that "[b]y seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to consumers, petitioner forwards a justification that is inconsistent with the basic policy of the Sherman Act." *NCAA*, 468 U.S. at 117; *see also United States v. Phila. Nat. Bank*, 374 U.S. 321, 370 (1963) (rejecting the notion that "anticompetitive effects in one market could be justified by procompetitive consequences in another").

These cases reflect sound antitrust policy. The Second Circuit took the contrary view, holding that unless the government established a "net" harm across American Express's merchants and cardholders, there could be no Sherman Act violation. *American Express II*, 838 F.3d at 206. In addition, the Second Circuit went so far as to assert that the ASRs might actually *benefit* merchants, writing, "[b]y attracting cardholders, Amex delivers a significant benefit to merchants: Amex cardholders," namely, additional customers. *Id.* at 205. Amici disagree with this premise. If it were true, American Express would not have needed the ASRs, and the unrestrained competitive process would have achieved the same end. Moreover, American Express could not show that the ASRs would increase market-wide output, as opposed to its own. That American Express was unwilling to allow that process to unfold demonstrates that it did not trust the unfettered market to achieve the result that was best for itself and that it claims would have been beneficial to merchants. *Prof'l Engineers*, 435 U.S. at 696 ("[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.").

In any event, this Court has condemned in strong terms proffered procompetitive justifications that would obstruct access to information in the name of competition: "The argument is, in essence, that an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices. Such an argument amounts to 'nothing less than a frontal assault on the basic policy of the Sherman Act.'"

Ind. Fed'n of Dentists, 476 U.S. at 463 (quoting *Prof'l Engineers*, 435 U.S. at 695)). It derives from a distrust of the competitive process, and admits of a purpose to circumvent it. American Express should not be able to dictate the terms of competition by imposing its preferences rather than allowing the competitive process to determine the proper balance between rewards and discount fees. *Cf. United States v. Apple Inc.*, 952 F. Supp. 2d 638, 701 n.64 (S.D.N.Y. 2013) ("Instead, the evidence is that Apple feared retail price competition with Amazon. Apple preferred to compete with Amazon on the strength of its device rather than through price wars."), *aff'd* 791 F.3d 290 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1376 (2016). Such a result is to the detriment of consumers, amici, the broader merchant community, and competition.

CONCLUSION

For these reasons, amici curiae respectfully submit that the decision of the Second Circuit should be reversed and the judgment entered by the district court should be affirmed.

Respectfully submitted,

GEORGE D. RUTTINGER
Counsel of Record
ANDREW I. GAVIL
CHARLES D. AUSTIN
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 624-2500
gruttinger@crowell.com

DANIEL A. SASSE
DEBORAH E. ARBABI
CROWELL & MORING LLP
3 Park Plaza, 20th Floor
Irvine, CA 92614
(949) 263-8400

JORDAN L. LUDWIG
CROWELL & MORING LLP
515 S. Flower St., 40th Floor
Los Angeles, CA 90071
(213) 622-4750

Counsel for Amici Curiae

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IN THE

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STATE OF OHIO, ET AL.

Petitioners,

v.

AMERICAN EXPRESS COMPANY & AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF 28 PROFESSORS OF ANTITRUST LAW AS *AMICI CURIAE* SUPPORTING PETITIONERS

ERIC F. CITRON
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

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Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application* (4th ed. 2017) ..... passim

INTEREST OF *AMICI*[1]

Amici are 28 antitrust scholars who write to share their disinterested perspective with the Court. Their respective backgrounds are compiled in the addendum, but it suffices to note that they include many leaders in the field, including the author of the treatise most often relied upon by this Court's antitrust opinions. *See, e.g.*, *Kimble v. Marvel Entm't*, 135 S. Ct. 2401, 2415 (2015) (Alito, J. dissenting); *F.T.C. v. Actavis*, 133 S. Ct. 2223, 2227 (2013) (Breyer, J.); *Pac. Bell Tel. Co. v. Linkline Commc'ns Inc.*, 555 U.S. 438, 453 (2009) (Roberts, C.J.); *Leegin Creative Prods. v. PSKS*, 551 U.S. 877, 894 (2007) (Kennedy, J.); *F.T.C. v. Phoebe Putney Health Sys.*, 568 U.S. 216, 228 (2013) (Sotomayor, J.); *Verizon Commc'ns v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 411 (2004) (Scalia, J.); *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1070 (10th Cir. 2013) (Gorsuch, J.) (citing Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application* ("Areeda & Hovenkamp")).[2]

Amici's interest in this case runs deep for two reasons. First, this Court has encountered few opportunities to offer substantial guidance to the lower courts on how to apply the rule of reason. It is thus

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[1] No party's counsel authored this brief in any part and no one other than *amici* or their counsel made any contribution to the preparation or submission of this brief. All relevant parties have provided blanket consent to briefs of *amici curiae*.

[2] All citations to the treatise are to the online edition that includes the 2017 supplement, and made by ¶ number.

particularly important that the Court's opinion here make that doctrine—which already confounds many lower courts—clearer rather than murkier. Second, the ideas introduced by the Second Circuit's decision below are particularly pernicious; they are small but potentially serious fractures to important, structural bones of antitrust doctrine that will cause lasting harm if not properly set by this Court.

As the district court's careful analysis showed, existing doctrines already provide accurate answers to questions like those this case posed. And as is often true, the introduction of special rules to deal with individual cases or isolated phenomena will tend to do much more harm than good. Special rules are obviously much more harmful if they are themselves inaccurate—as the Second Circuit's were. But whether theoretically accurate or not, they also introduce occasions for lower courts to miss the forest for a tree they have misunderstood and that was never necessary to plant.

We strongly believe this is true with respect to the Second Circuit's (inaccurate) rules regarding so-called "two-sided markets."[3] These business models are certainly important to scholars of business strategy—and increasingly so as their prevalence grows in today's technological environment. But the prevail-

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[3] Because, as explained *infra* p.28-31, the language of "two-sided markets" is confounding for antitrust purposes, we believe it clearer to refer to the general phenomenon as a two-sided "platform" or "business model." The "two-sided-market" terminology having caught on below, however, we use the terms interchangeably here.

ing view among antitrust economists and scholars is that two-sidedness does not require changing the settled rules of antitrust law, which can already analyze competitive issues in such "markets" with straightforward doctrinal tools that provide accurate results.

SUMMARY OF ARGUMENT

At bottom, this case concerns two critical, related, and mistaken ideas that the Second Circuit introduced into antitrust law and economics, and that this Court should reject. One is that a "relevant market" for antitrust purposes must (or even can) include "both sides" of a two-sided platform; the other is that competitive harms and benefits must be (or even can be) "netted" across relevant markets in rule-of-reason cases. These ideas are not only wrong, but in direct tension with core principles animating antitrust law.

In contrast, the district court's opinion straightforwardly applies settled doctrine—accepting the facts as found, we believe it properly concluded that there was an antitrust violation in this case by determining that (1) American Express (Amex) had sufficient market power to successfully impose a restraint eliminating horizontal price competition among its competitors, and (2) this led, in turn, to several anticompetitive effects, including supracompetitive prices for merchant network services. While Amex was free to introduce evidence of offsetting procompetitive benefits, the district court found that it did not, in part because the "benefits" it pointed to could not be deemed legitimate or procompetitive. We believe any proper rule-of-reason analysis should reach the same outcome on the facts as found, and it is evident that the Second Circuit only did oth-

erwise by indulging its two mistaken ideas about "two-sided" antitrust markets.

This brief thus proceeds in two parts. Part I explains certain basic tools of antitrust analysis—both how *and why* we use them in rule-of-reason cases—using the district court's legally sound analysis as a guide. Part II explains the critical errors in the Second Circuit's two-sided-market analysis: Section II.A explains briefly why multiple "sides" of a multi-sided platform or business model cannot be included in the same relevant market; Section II.B explains that the Second Circuit's "netting" exercise is unsound and ultimately antithetical to the basic purposes of the Sherman Act. Section II.B.ii also includes an explanation of how existing rule-of-reason doctrine permits courts to consider relevant arguments about two-sided platforms in a case like this one, while the Second Circuit's novel approach, even if sound, substantially increases the risk of lower-court error.

Were we to boil all that down to a few sentences, however, we would just say this. Efficient allocation of resources in the economy depends on undistorted competitive price signals. The correct "balance" between, say, merchant prices and consumer rewards in related or even interdependent markets is thus determined *by competition itself*; that role cannot be filled by a judicial scale-balancing exercise balancing different market participants' welfare because that lies well beyond any judge's (or economist's) ken. That Amex manipulated this balance through a restraint that virtually eliminated horizontal price competition is the antitrust *problem*—not a defense—because antitrust law endeavors to preserve competition on all sides of any business's operations, and let

the free market's invisible hand take the wheel from there.

I. The District Court Correctly Applied Rule-Of-Reason Analysis To The Facts It Found.

A. How the rule of reason works.

The rule of reason, which is correctly laid out in petitioners' briefs, U.S. Br. 20-22; Ohio Br. 20-22, is a three-step heuristic courts have developed to determine the lawfulness of an alleged restraint with potentially ambiguous competitive effects. The plaintiff begins by showing that the restraint is plausibly anticompetitive; the defendant responds by proffering any legitimate, procompetitive justification it has for the restraint; and the plaintiff responds by attempting to prove that any proffered justifications are either factually false (*i.e.*, the restraint does not serve them) or at least available through "a substantially less restrictive alternative." Areeda & Hovenkamp ¶1502. Even if there are no less restrictive alternatives, courts may still find that the restraint is harmful on balance to competition in the relevant market—though even this in-market balancing exercise by courts is (appropriately) rare. *See, e.g.*, Michael Carrier, *The Rule of Reason: An Empirical Update For The 21st Century*, 16 Geo. Mason L. Rev. 827, 827-29 (2009) (finding balancing step reached in only 2.2% of cases from 1999 to 2009, and 4% of cases from 1977 to 1999). Below, we briefly elaborate these three steps and the tools antitrust law uses to conduct them.

1. Step one and "market power"

The first step—the plaintiff's showing that the restraint is "*prima facie* anticompetitive," *Cal. Dental*

Ass'n v. F.T.C., 526 U.S. 756, 771 (1999)—can be made in one of two ways. Both implicate, albeit differently, the critical concept of **market power**. The "direct method" involves direct proof of an actual anticompetitive effect, which proves *a fortiori* that the defendant has sufficient market power to bring that effect about. The "indirect method" involves independent proof of both market power and a restraint that plausibly harms competition.

This Court has said that "market power" is the power to get a purchaser "to do something that he would not do in a competitive market."[4] *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 464 (1992). More rigorous economic definitions are available—the most accepted being the power to profitably raise price above marginal cost, *see* William Landes & Richard Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 939 (1981)—and that definition is frequently helpful in contexts like merger analysis. But in a case like this, the definition from *Eastman Kodak* expresses the critical conceptual point.

Market power matters in a restraint case like this one because, in its absence, merchants themselves could fight anticompetitive contract terms like Amex's non-discrimination provisions (NDPs) by simply diverting their business to competitors. Antitrust law prefers trusting competition itself to protect the market in this way, which competition will do *in*

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[4] Notably, no coercion need be involved; the "power" comes solely from the presence (and elasticity) of consumer demand and the lack of substitute sources of supply.

the absence of market power. As Justice Scalia put it, certain potentially anticompetitive restraints "are completely without force when the participants lack market power." *Eastman Kodak*, 504 U.S. at 488 (dissent) (citing Areeda & Hovenkamp); *see also F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460 (1986) ("[T]he purpose of the ... market power [inquiry] is to determine whether an arrangement has the potential for genuine adverse effects on competition[.]"). Thus, in a restraint case, the question is whether the defendant has sufficient market power to make the alleged restraint effective.

In cases involving the "direct method," like this one, the market-power showing is effectively subsumed by the plaintiff's direct proof that the alleged restraint is causing anticompetitive effects. In that case, we know the defendant has sufficient market power to generate those effects because it *is* generating them. Thus "'proof of *actual* detrimental effects' ... can 'obviate the need for an inquiry into market power.'" *Indiana Fed'n*, 476 U.S. at 460-61 (citing Areeda & Hovenkamp) (emphasis added). In fact, it can establish that the requisite market power exists more directly "than calculations of elusive market share[s]" or other indirect inquiries. *Todd v. Exxon Corp.*, 275 F.3d 191, 206 (2d Cir. 2001) (Sotomayor, J.). Notably, as the United States emphasizes, U.S. Br. 23-34, this case involved very strong proof under the direct method—especially the evidence that Amex's rules entirely suppress horizontal price competition among Amex and its competitors. *See* Pet.App. 204a-207a & n.43 (discussing Discover testimony); *id.* 197a-198a (discussing Amex's own acknowledgements of lack of pricing competition).

In "indirect method" cases, market power must be proven independently. Typically, after identifying the alleged restraint, the factfinder will define the **relevant market** in which that restraint operates (discussed *infra* pp.12-13, 17-20), and then attempt to infer market power from the defendant's estimated market share and other factors. Particularly in restraint cases, this inquiry is a rough proxy at its very best; sufficient market power to insist on some restraints can arise from a small share of a very concentrated market (like Amex has here), and can other times be absent even when market share is very high (for example, when entry is easy). *See, e.g.*, Areeda & Hovenkamp ¶515 ("A firm could have substantial market power without accounting for all or even most of a market. By the same token, the power of a firm with a dominant market share might be very high or negligible[.]"); Louis Kaplow, *Why (Ever) Define Markets?*, 124 Harv. L. Rev. 437 (2010) (expressing skepticism that market definition truly aids in assessing market power). Some restraints can also be easier to impose with less unilateral market power because (as here) they are good for one's own competitors as well, and lead to reinforcing behavior in oligopolistic settings, *see, e.g.*, Areeda & Hovenkamp ¶¶530b, 574a—as happened when Visa and MasterCard adopted their own NDPs. Pet.App. 180a. It is thus frequently preferable to look for direct proof of market power, which may include (among other things) a defendant's ability to raise prices repeatedly without losing share, very high and persistent economic profits, or ready success in thwarting counter-parties' efforts to resist the imposition of disfavored restraints. *See* Pet.App. 158a-163a (detailing considerable evidence in this regard); *accord United States v. Microsoft*, 253

F.3d 34, 58 (D.C. Cir. 2001) (pointing to Microsoft's pricing conduct and pattern of exclusionary behavior as direct evidence of monopoly power).

Before moving on, it is critical to emphasize that there is *nothing illegal about having market power*. The Sherman Act does not condemn its mere acquisition or existence; it is, in this context, only an indication that an allegedly anticompetitive restraint *might work*. Put otherwise, "[w]hile market power is a necessary condition for an anticompetitive restraint under the rule of reason, it is never a sufficient condition." Herbert Hovenkamp, *The Rule of Reason* p.17 (Fla. L. Rev. forthcoming 2018) ("*Rule of Reason*"), https://goo.gl/4CL5jx.

The Second Circuit thus erred quite seriously when it held that Amex's "cardmember insistence" could have no bearing on its market power, particularly because it derived from "cardmember satisfaction" and so couldn't be a bad thing. Pet.App. 45a-48a. In this case, it was not relevant where Amex's market power *came from*; the law cares only whether it exists, and so might make a putatively anticompetitive restraint possible. Accordingly, if merchants so wanted Amex that they felt bound to accept it, that demonstrates market power without regard to why that dynamic exists.[5] The district court was thus

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[5] Relatedly, note that creating "worthwhile" products often creates market power while even a patent "monopoly" on other products would not. The patent-holder on a cure for cancer would have enormous market power; the patent-holder on a new headache remedy likely wouldn't, given competing alternatives. *See* Areeda & Hovenkamp ¶518e; *Illinois Tool Works v. Independent Ink*, 547 U.S. 28 (2006).

quite right to regard "cardholder insistence" as strong evidence of market power, and the Second Circuit quite wrong to reject it while expressly noting, several times, that "cardholder insistence is precisely what makes accepting Amex cards worthwhile for merchants to do." *See id.* That which makes "accepting Amex cards worthwhile" is *exactly* what gives Amex market power.

2. Step two

Once the plaintiff makes its *prima facie* showing under either the direct or indirect method, the burden shifts to the defendant to proffer any legitimate, procompetitive justifications it may have for the restraint. This burden shift follows from basic principles of proof that are not specific to antitrust. "The defendant, being the author of the restraints, is in a better position to explain why they are profitable and in consumers' best interests." Areeda & Hovenkamp, ¶1505.

It is important to note, however, that not every justification that generates welfare somewhere in the economy—even by lowering prices—can be deemed "legitimate" or "procompetitive." Instead, this requirement must exclude (at least) one type of justification. Because promoting competition is the goal of the antitrust laws, "defendants' expectation of profit" from a restraint must come "from something other than a restriction of competition" itself. *Rule of Reason*, p.22. Put otherwise, "[a]n effective defense must be able to show that a practice has social benefits that *do not depend on the exercise of market power*." *Id.* p.23 (emphasis added). Accordingly, at an absolute minimum, a defendant's justification cannot be that it will use a restraint to generate monopoly rents

or restrict output in one aspect of its business and then reinvest that revenue elsewhere—including, of course, in its own bottom line.

As an example, this Court in *NCAA v. Board Of Regents of University of Oklahoma*, 468 U.S. 85, 116-17 (1984), did not permit the NCAA to defend a restriction on televising college football games on the theory that it would "protect live attendance." That justification rested on the view that exercising market power and restricting output (*i.e.*, limiting broadcasts) would lead to benefits elsewhere in the economy, and so was "inconsistent with the basic policy of the Sherman Act." *Id.* As this Court put it, "'the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.'" *Id.* at 117 (quoting *Nat'l Soc'y of Prof'l Engr's v. United States*, 435 U.S. 679, 696 (1978)). In contrast, this Court explained that restrictions aimed at protecting "the integrity of [the product] as ... distinct and attractive," or promoting the NCAA's non-competition-related ends (like preserving a "revered tradition of amateurism in college sports") could be legitimate, so long as they rested on evidence that the restriction pro-competitively increased output in the relevant market, rather than on the impermissible intuition that restricting output was somehow "pro-competitive." *See id.* at 116-17, 120.

3. Step three

If legitimate justifications for the restraint are offered, the burden shifts back to the plaintiff to demonstrate that a "substantially less restrictive alternative" could achieve the same benefits. Areeda & Hovenkamp ¶1502. "By this stage of the controversy, most cases will be resolved. If not—and rarely—the

harms and benefits must be compared to reach a net judgment whether the challenged behavior is, on balance, reasonable." *Id.* Notably, this balancing occurs *within* the relevant market, *see infra* pp.20-27; the factfinder is not asked to balance the welfare of one set of consumers against another's somewhere else.

B. The district court's analysis

The district court applied this settled framework to the facts as it found them, which are amply described in petitioners' briefs. *See* U.S. Br. 2-12, 23-34; Ohio Br. 1-13. Without unduly revisiting those facts, the following section briefly reviews the district court's legal analysis of them to demonstrate how the rule of reason properly operates in practice.

The court began by defining the **relevant market**. Pet.App. 111a-148a. This was the appropriate first step for two reasons. First, because the plaintiffs purported to carry their *prima facie* burden through both the direct and indirect method of proof, a market definition was needed to assess Amex's market power using its market share and other factors. Second, and more important here, a basic mapping of the relevant market is necessary to set the scope of the ensuing inquiry, even under the direct method. It is true that, because the "purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effect[s]" can be "sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis." *Ind. Fed'n*, 476 U.S. at 461. Even then, however, courts must ultimately establish the basic boundaries of the market in which the restraint op-

erates.[6] To both ends, market definition must be tied to the set of *substitutes* reasonably available to the market participants at issue if it is to serve its purpose. *See infra* pp.17-20 (elaborating this point); *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 395 (1956) ("In considering what is the relevant market ... no more definite rule can be declared than that" it consists of "commodities reasonably interchangeable by consumers for the same purposes[.]").

Here, the district court engaged in rigorous market definition, looking to both well-established economic tests and a pragmatic analysis of competitive realities supported by the testimony of market participants. It found that the relevant market encompassed "general purpose credit and charge card network services" offered to merchants. That market is highly concentrated; those services are supplied by only three major players (Amex, Visa, and MasterCard) and one minor one (Discover). Among other things, the district court declined to include debit-card services within the relevant market by determining that debit- and credit-card services were not

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[6] In cases that use the "direct method," it may not be necessary to *start* with market definition because "[e]vidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects." US DOJ & FTC, *Horizontal Merger Guidelines* §4 (2010). *See also id.* (further noting that "analysis need not start with market definition" because "although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis," some analytic tools "to assess competitive effects do not rely on market definition").

"reasonably interchangeable" and merchants would not substitute one for the other. Pet.App. 122a-143a.

Having defined the market, the district court undertook the market-power analysis required for at least the indirect method of establishing a *prima facie* case. After analyzing Amex's market share in combination with a set of other relevant factors including entry barriers, the high degree of industry concentration, and the "amplifying effect" of Amex's "highly insistent or loyal cardholder base," it found that Amex had market power. Pet.App. 150a-165a; *supra* pp.9-10. It also relied on direct indicia of market power, including Amex's ability to repeatedly raise prices without losing share, *id.* 165a-180a, and on-point testimony establishing that even the largest national merchants cannot drop Amex in response to its NDPs—though some have tried (and rapidly failed). *E.g.*, Pet.App. 162a-164a.

After finding that Amex had market power, the district court concluded its step-one analysis by also finding direct proof of anticompetitive effects. It found that the challenged NDPs virtually eliminated horizontal price competition for merchant network services, impeded entry by low-cost business models, stifled innovation, and raised prices for both merchants and their customers. Pet.App. 191a-214a. It thus held (correctly, on these facts) that plaintiffs had satisfied their *prima facie* burden through both the direct and indirect method. At a minimum, it is certain as a matter of antitrust law that a firm's exercise of market power to frustrate price competition among its competitors "to the point of near irrelevance," Pet.App. 195a, at least *plausibly* causes anticompetitive harm.

The district court then turned to Amex's proffered legitimate justifications at step two. Pet.App. 228a-258a. It began by carefully parsing Amex's argument that the NDPs and their restrictions on steering were necessary to sustain Amex's "spend-centric" business model. *Id.* 230a-240a. The district court determined that, at bottom, this was an argument that the high merchant discount rates sustained by the NDPs were necessary for Amex to offer more lucrative rewards to cardholders, effectively "shift[ing] the bulk of interbrand competition in the credit and charge card industry to the cardholder side of the platform." *Id.* 234a-241a. The court found this argument both factually unsupported and fundamentally incompatible with the Sherman Act. Among other things, it (correctly) cautioned that Amex seemed to be defending the viability of its own business model rather than competition as such, Pet.App. 235a, and that "the law does not permit American Express to decide on behalf of the entire market which legitimate forms of interbrand competition should be available and which should not." Pet.App. 240a; *see supra* p.10 (noting that suppression of competition is not a "legitimate" or "procompetitive" justification).

Because Amex's proffered justifications were deemed both unsupported and illegitimate, the court did not proceed to step three. Instead, it properly concluded that the profound effect that the NDPs have on horizontal price competition in the relevant market for merchant network services—and the resulting supracompetitive prices imposed on merchants by Amex *and* its competitors—constituted a violation of the Sherman Act.

In our view, this was a prototypical and straightforward application of rule-of-reason analysis that appears to have reached the correct result—at least on the facts as the district court found them. In fact, any analysis leading to a contrary result is necessarily suspicious. While vertical restraints like Amex's frequently have only limited effects on *inter*brand competition (and may promote it), *see, e.g.*, *Leegin*, 551 U.S. at 890, the district court found here that Amex's NDPs had profoundly restricted *horizontal* price competition not just between Amex and its competitors, but *among all* competing providers. With the NDPs in place and secured by Amex's market power, none of Amex's competitors had any incentive to lower price; merchants' inability to steer customers to lower-cost cards (or even give customers truthful information about the cards' merchant fees) had severed the connection between prices to merchants and their quantities of card usage. Pet.App. 228a. In fact, Discover had testified—credibly, from an economic perspective—that it simply could not gain share by cutting merchant prices, and so rapidly raised them instead. Pet.App. 206a. The court found that supracompetitive prices and other anticompetitive effects had in fact resulted. Pet.App. 191a-214a. This established a violation of the Sherman Act, and certainly sufficed for a *prima facie* case.

II. The Second Circuit's "Two-Sided-Market" Innovations Are Fundamentally Unsound.

Given the district court's sound analysis, the Second Circuit's reversal was erroneous. But the much more critical point here is that the *reasons* the Second Circuit gave for reversing—both of which sounded in the "two-sidedness" of Amex's business—

are highly problematic. Neither is logically sound and both threaten to undermine basic principles of antitrust law and economics. It is imperative the Court reject both.

A. The relevant market cannot encompass both sides of Amex's platform.

As noted above, a relevant market for antitrust purposes is defined by the identification of reasonable substitutes for the product at issue. This can be done with relatively rigorous economic analysis where necessary—including measurements of cross-elasticities of demand among putative substitutes—but it can often be done with a more practical analysis of "commercial realities" and participant behavior. *See, e.g.*, *Eastman Kodak*, 504 U.S. at 482; *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *DuPont*, 351 U.S. at 394.

Either way, the products that Amex sells on the two "sides" of its platform do not exhibit the characteristics of "reasonably interchangeable" substitutes in any respect. Merchants do not buy and have no use for the services sold to cardholders and cardholders do not buy and have no use for the services sold to merchants. There is *zero* cross-elasticity of demand: A merchant cannot switch to purchasing cardholder services in response to an increase in the price of merchant services, and vice versa. Far from being substitutes, these services act more as complements and so cannot belong in the same relevant market. *See* Areeda & Hovenkamp ¶565 (explaining that the Court of Appeals "incorrectly conclud[ed] that the relevant market in which to consider American Express's anti-steering rules was not limited to the market for network [merchant] services but also in-

cluded consumers. ... [T]hose two groupings are not substitutes for one another but rather behave more as complements."). Separate markets do not become a single relevant market for antitrust purposes simply because one defendant sells two services as part of the same platform. *See id.* (Second Circuit "was apparently misled by the fact that Amex obtained revenue from two sources, ... but the fact that a firm obtains its profits from two different, non-substitutable groups does not serve to place the[m] ... into the same relevant market").

As the United States correctly notes, U.S. Br. 35-40, there is in fact no logical way to include two different "sides" of a company's platform or business model in one antitrust market. Among other things, they do not include the same participants—a point the district court emphasized in rejecting this argument. Pet.App. 119a. On the merchant "side," Amex competes only with Visa, MasterCard, and Discover in a highly concentrated market; on the cardholder "side," Amex competes with Discover, Chase, Capital One, Citibank, and thousands of other banks that issue credit cards. Visa has a 45% share on the merchant "side" and essentially a 0% share in issuing cards or providing cardholder rewards—the individual banks do that. Were it an important consideration here, how would Visa's "combined" share of the merchant/cardholder market be calculated? Is it 45%, 22.5%, 0% or something else altogether? There is no logical or practicable way to provide an answer.

Relatedly, but perhaps more importantly, attempting to combine these two sides of Amex's business into one antitrust relevant market (however that might be done) would undermine the very rea-

sons for performing a market definition in the first place. We define markets in antitrust analysis to determine whether market power exists in the relationship between two sets of economic counterparties; we want to know whom the market participants facing a restraint or price increase might look to in an effort to discipline the anticompetitive behavior of a seller through competition itself. One need not measure cross-elasticity of demand to see that a merchant dissatisfied with Amex's imposition of the NDPs on anyone *accepting* Amex cards cannot respond by *taking out* a new credit card with Chase or Capital One.

Indeed, generally, the competitive dynamics that determine the effect of a restraint or price increase that a company imposes on customers in one aspect of its business are not predictably affected one way or another by the nature of competition in that company's other market relationships. This is to say that effects occurring in other, closely interrelated markets may ameliorate an anticompetitive effect in the restrained market, they may exacerbate it, or (as likely happened here) they may have no plausible effect at all because of how the restraint itself muffles competitive price signals. Thus, even if there are cases where we have good reason to believe that out-of-market effects cause "feedback" effects in the restrained market, *see infra* p.31, the solution cannot be to lump two markets for non-substitutes into the same "market."

In sum, we care about market definition in restraint cases because it sets the appropriate scope of the rule-of-reason inquiry—establishing the sphere in which the coupling of market power and an anticompetitive practice can cause the kind of distortion and

welfare loss that matters to antitrust law. If competition across that relationship has been harmed or destroyed, that is sufficient to cause resources to be diverted inefficiently both within that relationship and across related parts of the economy in ways that untainted price signals would avoid. Defining the market more broadly to include other aspects of the restraining party's business will lead to overlooking those distortionary, anticompetitive effects, and ensure that market definition itself fails to answer the questions for which it is asked.

B. "Netting" or "balancing" competitive effects across both sides of a two-sided platform is fundamentally unsound.

The Second Circuit's holding that a plaintiff's *prima facie* case must also show "net" anticompetitive effects across both sides in a case involving a two-sided platform is also pernicious. Both logically and practically, this is deeply unsound. Logically, it ignores that the balance of prices across the platform's "sides" should be set *by competition*, not skewed by competitive restraints and then excused by *ad hoc* judicial balancing. And practically, it asks courts to perform complex analyses they will find confusing or impracticable, not the least of which is attempting to pin down the ill-defined phenomenon of "two-sided markets" itself.

1. The Second Circuit's "netting" exercise is erroneous.

Though hard to define, *see infra* pp.28-31, two-sided platforms are certainly a recognizable phenomenon, and increasingly important to students of business strategy and industrial organization. The dis-

trict court concluded that Amex was a two-sided platform because it "sells different products or services to two separate yet interrelated groups of customers who, in turn, rely on the platform to intermediate some type of interaction between them." Pet.App. 77a-78a (citing Evans & Schmalensee, *Industrial Organization of Markets with Two–Sided Platforms*, 3 COMPETITION POL'Y INT'L 150 (2007); Rochet & Tirole, *Two–Sided Markets: A Progress Report*, 37 RAND J. Econ. 645 (2006). For now, we adopt this as a working definition.

Note, however, that it is quite broad and encompasses ubiquitous business models like newspapers (which sell to and unite readers and advertisers), brokers of all stripes (who sell to and unite buyers and sellers), cable companies (which sell to and unite content providers and viewers), and many more. From a competition-policy perspective, these industries do share certain characteristics: For example, there is the "cross-platform network effect" the district court identified, where "the number of agents or the quantity of services bought on one side ... affects the value that an agent on the other side of the platform can realize." Pet.App. 79a. But these businesses also vary widely and there may be very little salience to their two-sidedness in any given case—especially relative to other traditional considerations like market concentration and barriers to entry.[7]

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[7] Indeed, the most salient aspect of two-sided platforms from an antitrust perspective may be that their network effects make entry by new platforms difficult, *increasing* the prospect of durable market power.

In any event, the ubiquity of two-sided business models means this Court has confronted them before and rejected the Second Circuit's special rule. In *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594 (1953)—which concerned the sale of advertising space by a newspaper—this Court was faced with a classic two-sided platform: The paper sells ad space to advertisers on one side and reporting to readers on the other. Recognizing that "every newspaper is a dual trader in *separate* though interdependent markets," *id.* at 610 (emphasis added), this Court held that, because the restraint at issue was applied only in one of them, the decisive question was whether the defendant had economic dominance in *that* market alone. *Id.* In other words, this Court held, in a case where the defendant operated a two-sided platform, that each side represented a "separate ... market" and that injuring competition in the restrained market alone was sufficient to violate the Sherman Act. This Court's analytical approach was correct then and remains so today; it need only adhere to this precedent to correctly decide this case.

Times-Picayune aside, however, *amici* would still strenuously urge this Court not to approve of any "netting" or "balancing" analysis across relevant markets—even if they are "both sides" of a two-sided platform—because that exercise is fundamentally inconsistent with the antitrust laws' core purposes. *See* Areeda & Hovenkamp ¶1505 (criticizing Second Circuit's "conclusion that when a restraint is alleged in a two-sided market, a *prima facie* case requires the plaintiff to allege net harm aggregated across both sides"). This idea finds its most damaging expression in the Second Circuit's notion that Amex should be

allowed to use its NDPs to obstruct price competition and keep merchant prices high because "a reduction in revenue that Amex earns from merchants' fees may decrease the optimal level of cardholder benefits." Pet.App. 49a-50a. Antitrust law and policy should not even indulge *arguendo* a defendant's excuse that it is robbing Peter to pay Paul; basic antitrust policy requires that "*competition* should choose the optimal mix of revenue between the two sides"—not Amex's near-total obstruction of horizontal competition among Amex and its competitors on one side or the other. *See* Areeda & Hovenkamp, ¶562e.

For this reason, while we believe this Court should reverse the Second Circuit and affirm the district court's judgment, we would urge the Court *not* to rely in any respect on the district court having already "balanced" the benefits and harms across Amex's merchant and cardholder markets, and/or having concluded that Amex still harmed competition in the market as the Second Circuit defined it. Petitioners understandably advance these alternative arguments as litigants, but we believe these analyses are ultimately unintelligible and should not be encouraged even as alternative considerations for future factfinders. Ultimately, they can only confuse the correct analysis.

Notably, Amex's putatively "procompetitive" justification that high merchant prices lead to more rewards and competition for cardholders is plainly of the illegitimate form described above, *supra* p.15—it clearly depends on the exercise of market power to work. Amex's justification for its restraint is simply that it will extract monopoly rents from merchants in order to use (some of) them to entice new cardholders

to its platform. This is an unmitigated negative from an antitrust perspective. As the United States correctly explains, U.S. Br. 45-46, antitrust law must reject the distortionary effects of dictating prices through restraints rather than competition because it disrupts the "central nervous system of the economy," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940).

To put the same point differently, it is important that lower courts not confuse mere "lower prices" somewhere in the economy with a "procompetitive effect." In important respects, the reality can be the exact opposite: By "disrupt[ing] the proper functioning of the price-setting mechanism"—that is, by using a restraint to increase prices over here and lower them over there—a practice necessarily undermines the competitive process and so can violate the rule of reason "even absent proof that it resulted in higher prices." *Indiana Fed'n*, 476 U.S. at 461-62. Accordingly, this Court has made clear that "[a] restraint that has the effect of reducing the importance of consumer preference in setting price" is inconsistent "with th[e] fundamental goal of antitrust law," *NCAA*, 468 U.S. at 107 & n.30, and that conduct that "'impedes the ordinary give and take of the marketplace,' and substantially deprives the customer of 'the ability to utilize and compare prices'" adversely affects competition. *Nat'l Soc'y*, 435 U.S. at 692-93. In the end, the goal is not to ensure that *somebody* benefits from an alleged restraint; rather, it is to ensure that the challenged restraint is not disrupting competition in *its* market, causing a misallocation of resources to or from other areas of the economy.

Indeed, indulging a "netting" or "balancing" approach across two-sided platforms would immediately vitiate the rationale for the best-known rule in all of antitrust law—the *per se* proscription against price fixing. Cartelists almost always have a story as to why their price increases or output restrictions are a net positive for the economy: They alleviate a supply glut, keep failing firms in business, increase wages, or minimize waste. Antitrust law accepts none of these excuses not because they could never be true, but because we are confident that the distortionary effects on price signals are bad, even if there are (no doubt) some parties throughout the economy who benefit from the cartelists' behavior. *See Socony-Vacuum Oil*, 310 U.S. at 226 n.59. ("Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy."). The law would no more accept those justifications for horizontal price fixing in the context of two-sided platforms; courts would certainly condemn the elimination of horizontal price competition the district court found here had it been created by agreement among Amex and its competitors. The distortionary effect of the cartel would be an antitrust policy problem without regard to whether fully 100% of the resulting rents are passed over to cardholders. And the very same principle explains why netting or balancing across the platform is inappropriate here, too.

Moreover, while the Second Circuit suggests that Amex passes on high merchant fees to cardholders as part of its business model, this phrasing somewhat

obscures reality. Amex is a profit-maximizing firm, not a wealth-redistribution engine; to the extent it increases rewards or decreases fees to cardholders, it is only because competition for cardholders makes it so. Notably, *that* market is healthy: There are thousands of rival firms issuing cards and competing to win a share of consumers' wallets, entry is relatively easy, and there is constant innovation in offers and rewards models. In contrast, the market is quite unhealthy on the merchant "side" because it is both quite concentrated and restricted by Amex's NDPs. Eliminating the NDPs will help to heal that market and so will undoubtedly affect both Amex's and its competitors' bottom lines, because they will now have to compete for both cardholders *and* merchants. But given the robustness of existing competition over cardholders, there may be no substantial decreases in reward expenditures at all. And even if there are, antitrust policy prefers to have two healthy markets rather than one, because that leads to more efficient resource allocation as between them.

Importantly, none of this is to say that Amex should be constrained in choosing the pair of prices *it* wants to charge merchants and cardholders in its own business model. The sole point is that it should not be free to use its market power to prevent merchants from fostering price competition *among* Amex and its competing card networks and benefitting from the lower prices other competing networks might offer merchants as a result. Nor should Amex be free to choose for consumers whether they prefer to forego Amex's rewards in favor of other inducements merchants might offer them for using the merchants' favored cards. *See* Areeda & Hovenkamp ¶1505

("[*C*]*ompetition* is what determines how revenue is assessed with respect to each side. Some card issuers pursue a strategy of obtaining high market fees while offering more generous terms to customers, while others do the opposite. [Amex's] policy effectively made customers indifferent to merchant charges and to the extent those charges could be expected to be higher, restrained competition[.]"). Contrary to the Second Circuit's view, Amex cannot have "a legitimate interest" in restricting free-market forces. The interaction of those forces—not Amex's NDPs—must be allowed to determine the optimal level of both merchant prices and cardholder rewards.

2. *A special "net" price or benefit rule for two-sided platforms is an unnecessary invitation to error in the lower courts.*

It is widely accepted that antitrust law must be implemented by an imperfect system that forces difficult economic judgments on lay judges and juries, and that it must therefore account for the risk of errors that harm competition in its pursuit of consumer welfare. *See, e.g.*, Frank Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1 (1984). That insight applies with special force to the inauguration of a new set of rules for two-sided markets that would require courts to attempt to create "net prices" or to aggregate and balance competitive benefits and harms across a two-sided platform. Even if this were theoretically possible, it is certainly impracticable and likely to create repeated errors in the lower courts that will contribute to market-wide inefficiency.

For example, efforts to balance competitive effects across relevant markets or generate "net" prices face intractable "commensurability" problems. The

district court found that Amex itself was unable to propose a workable net price measurement that accounted for prices on both sides of its platform, Pet.App. 184a, and that result is hardly surprising. Amex extracts merchant discount fees in dollars and pays out rewards in "miles," "points," progress toward status rewards, and other non-monetary benefits. Amex also charges ever-changing fees and interest rates that in part reflect the consumer "price" for card usage. There is thus no ready way to even approximate the per-transaction dollar price to cardholders for using their Amex card, let alone "balance" a cardholder's price against a merchant's price for two different services.

Creating a special rule that permits cross-market balancing of benefits and harms for "two-sided markets" will also lead to vexing questions about how even to define which markets are "two-sided." Based on various (easily confused) definitions, so-called two-sided markets might encompass anything from businesses with plain-vanilla, vertical supply chains to what Amex calls its "two-sided transaction market." *See* Pet.App. 78a. These definitions appear to us orthogonal to underlying antitrust principles, and so should not be turned into important doctrinal boxes that come with different rules and defenses. Instead, as we explain below, the underlying antitrust principles can themselves be used, through ordinary antitrust analysis, to capture whatever is special about a business model's two-sidedness in any given case.

Begin by noting that two-sidedness is ultimately a description of *a business model*, not a "market" at all. Uber, Lyft, taxi cabs, and typical livery services all compete directly in the market for riders, but

their business models are different, and there may or may not be substitution among them in the driver or labor market. A rule that permits or requires cross-platform balancing for cases involving "two-sided markets" is thus inherently confusing: Does it apply whenever the *defendant* operates a two-sided platform, when its closest *competitors* are also two-sided platforms, when *some competitors* are also platforms, or on some other basis? Why can Uber try to excuse a restraint that injures its drivers based on benefits to riders when a livery or cab company could not?

Note, also, that every business has *far* more than two "sides." Apple and Google have similar platforms for selling online music, but also compete vigorously for specialized labor, real estate in Silicon Valley, mobile operating system usage, and more. Suppose Google imposes a restraint on performers selling music in the Google Play store and defends it as generating higher profits it can use to sell its Pixel phones more cheaply in competition with iPhones, or to set its salaries for programmers higher so as to be more competitive in that market. What makes these exercises in cross-market balancing—which clearly violate the Court's focus on individual markets in *Times-Picayune* and *NCAA*—any different from Amex's argument here?

Next, imagine an online consignment operation for consumer electronics that returns a discounted portion of every sale to the original owner, while offering buyers a reward for every transaction. So far as we can tell, this is a "two-sided transaction market" that mirrors Amex's business model quite precisely. Pet.App. 78a. But even from a colloquial perspective, what "market" does this consignment busi-

ness occupy? Is it a consumer-electronics market? A used consumer-electronics market? A consignment-based, used consumer-electronics sales market? An online electronics resale platform market? Merely adverting to the company's two-sided business model tells us nothing about its *markets*, or whether it qualifies for a special cross-market balancing rule.

The natural answer in terms of antitrust market definition, of course, is that putting this business in a market depends on what the case is about. The *relevant* market depends on why we care: If our online consignment operation is merging with a brick-and-mortar retailer of new electronics, it may cause unacceptable concentration in the market for consumer electronic sales (where both parties compete), but probably not in the market for repurchasing used electronics from original owners (because only one operates there). It may also cause no problems at all, depending on the nature of substitution between new and used sales and online and local sales. The important point, however, is that the antitrust answer to the question of what market our consignment business occupies may lie on either side of a company's "platform" and may encompass business models with ordinary vertical supply chains or not, all depending on the case or restraint at issue. For similar reasons, there is no way to know *ex ante* whether the two-sidedness of a defendant's platform will affect market definition, market power, anticompetitive effects, or anything else antitrust law cares about. The two-sided-market category is the tail, not the dog.

That said, the United States is certainly correct that the two-sidedness of a company's business *can* be relevant in any given case. U.S. Br. 50-54. Its

relevance, however, is already captured by the ordinary tools of antitrust analysis as the district court applied them. Clarifying how those tools work—rather than adding new, hard-to-implement rules for new, hard-to-define categories—is far more likely to help the lower courts avoid serious errors.

For example, it is already understood that when two aspects of a company's business model are closely related or "interdependent," that may mean that competitive effects or anticompetitive distortions on one side of its business will strongly affect the other over time, and vice versa, causing "feedback" effects that may ameliorate or exacerbate the original distortion. *See, e.g.*, Areeda & Hovenkamp ¶562e. These "dynamic" considerations or "feedback" effects may constrain *or* reinforce anticompetitive exercises of market power; it depends entirely on industry-specific context. In any case, however, a defendant is free to argue that its market power in one market is illusory in fact because the close interrelationship between that market and another disciplines its ability to raise prices or impose anticompetitive conditions in the relevant market.

But, importantly, if that argument *is* presented, it requires no special two-sided-market rules to analyze; all it needs are the conventional tools for deciding whether market power exists or not. And particularly where (as here) the proof of market power and anticompetitive effects is established through *direct evidence*, there is no reason to worry that we have incorrectly assessed a defendant's power in the relevant market by ignoring a price effect somewhere else in the economy. We know the requisite market power exists because the anticompetitive effect occurred.

Indeed, notice that Amex could not possibly make such an argument here, because the very anti-competitive effect of its restraint is to *sever* the connection between the merchant and cardholder sides of its platform. Competition for cardholder transactions does not benefit merchants (or constrain the exercise of market power over them) because merchants lack the ability to steer cardholders away from cards that charge them a higher price. The two sides of the Amex platform may be interdependent in some ways, but—given the NDPs—they are not interdependent in the important sense that competition for cardholders will (or even can) feed back into improved pricing conditions or competitive dynamics on the merchant side. The restraint itself prevents the feedback.

Defendants can also potentially argue that the feedback effect is one that improves the competitive process operating on *both* aspects of its two-sided platform at once through a conventional step-two, rule-of-reason argument. We take this to be the United States' suggestion that the defendant can show "at the second step" that the restraint is "reasonably *necessary* to achieve legitimate *pro-competitive* benefits in a closely related and *interdependent* market." U.S. Br. 52 (emphasis added).[8] This entails a frankly difficult showing that the "dynamic" effects of a restraint are ultimately good for

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[8] Formally, this does not entail balancing of out-of-market "benefits" with in-market "harms"—an analysis the United States itself rejects. U.S. Br. 41, 45-46. Instead, it entails looking to out-of-market effects in interdependent markets because they may improve (or reflect improved) competition in the relevant market itself.

the restrained party in the medium-run in a way the antitrust laws can accept. Often, this requires showing that a product could not exist without the restraint. And, importantly, that showing needs to be made for the *product*—not just the defendant's version of it—to ensure that this argument does not reduce to the view that "competition should be restrained because it would hurt *my* ability to compete with my competitors (and their potentially superior business models)." That argument, of course, is the one this Court has rightly rejected as unacceptable throughout antitrust law. *See supra* pp.10-11 (discussing *NCAA*); *Brown Shoe*, 370 U.S. at 320 (antitrust law is "concern[ed] with the protection of *competition*, not *competitors*") (emphasis added).[9]

Ultimately, we believe the consideration of out-of-market benefits in cases involving two-sided platforms (or other interdependent markets) is at best an oblique way of getting to the simpler question of whether competition continues to protect or ultimately benefits the restrained parties, and while such "dynamic" analyses might theoretically prove profitable, we doubt the game is worth the several boxes of candles it will take the lower courts to play it. The "out-of-market benefit" inquiry tends in the direction of weighing the welfare of one set of consumers against the welfare of another, which is what antitrust law seeks to *avoid* in favor of reliance on compe-

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[9] In any event, the general condition on this showing is the one emphasized at the beginning, *supra* pp.10-11, and that the Court *must* make clear: A legitimate justification must not depend on the existence of market power to work. *See* Areeda & Hovenkamp ¶1505.

tition itself. Meanwhile, the hypothetical causal chain that makes an out-of-market benefit procompetitive overall is typically attenuated and will be hard for lower courts to follow, so this Court should regard the risk of lower-court error as both high and very costly. Because the ultimate concern remains on the avoidance of competitive distortions within any properly defined set of market relationships—that is, within a relevant market—the better course is for this Court to simply instruct the lower courts to look for evidence of off-setting benefits solely within the relevant market itself.[10] That is particularly so because the kind of multi-step causal tracing exercise involved in the consideration of out-of-market benefits is precisely the kind of complexity this Court's antitrust rules have endeavored to avoid. *See, e.g.*, *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

Whatever the Court says in this regard, however, it should make clear that it cannot help Amex for the reasons the district court gave below. Amex's fundamental argument is that it must prevent steering away from its cards in order to keep its rewards high

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[10] *Accord* Douglas H. Ginsburg & Joshua Wright, *Dynamic Analysis and the Limits of Antitrust Institutions*, 78 Antitrust L.J. 1 (2012) (concluding that courts should hesitate in incorporating "dynamic effects" analysis, even if theoretically useful, because of high risk of error); *cf. Horizontal Merger Guidelines* §10 n.14 (noting that agencies properly consider any anticompetitive effect in a relevant market sufficient to challenge a merger, and consider "efficiencies not strictly in the relevant market" only as a matter of prosecutorial discretion).

and support its business model. That argument depends on using an exercise of market power to raise prices and direct the benefits elsewhere, and imposes a restraint that ensures that those benefits *cannot* redound to merchants' benefit through the competitive process. It is thus neither legitimate nor procompetitive, and so the district court properly rejected it. Pet.App. 234a-241a. This Court should thus reverse the Second Circuit's decision and, for the sake of clarity in future cases, affirm the sound application of the rule of reason by the district court.

CONCLUSION

This Court should reverse the Court of Appeals and affirm the judgment of the district court.

Respectfully submitted,

Eric F. Citron
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

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ADDENDUM

ADDENDUM
Identity of *Amici Curiae*

The *amici* listed below are distinguished antitrust law professors and scholars. University affiliations are listed only for purposes of identification. Listed professors are acting only in their individual capacities and do not purport to represent the views of their universities.

- **Herbert Hovenkamp**, James G. Dinan Professor at the Law School and the Wharton School of the University of Pennsylvania. He has been the Rockefeller Foundation Fellow, Harvard Law School; Fellow of the American Council of Learned Societies, Harvard Law School; Faculty Scholar, University of Iowa; Presidential Lecturer, University of Iowa; and the recipient of the University of Iowa Collegiate Teaching Award. He is the senior surviving author of *Antitrust Law* (formerly with Phillip Areeda & Donald Turner), currently 22 volumes.

- **Harry First**, Charles L. Denison Professor of Law at New York University School of Law and Co-Director of the law school's Competition, Innovation, and Information Law Program. From 1999-2001 he served as Chief of the Antitrust Bureau of the Office of the Attorney General of the State of New York. Professor First is the co-author of the casebook *Free Enterprise and Economic Organization: Antitrust* (7th Ed. 2014). He was twice a

Fulbright Research Fellow in Japan and taught antitrust as an adjunct professor at the University of Tokyo. Professor First is a contributing editor of the *Antitrust Law* Journal, foreign antitrust editor of the *Antitrust Bulletin*, a member of the executive committee of the Antitrust Section of the New York State Bar Association, and a member of the advisory board and a Senior Fellow of the American Antitrust Institute.

- **Einer R. Elhauge**, Petrie Professor of Law at Harvard Law School, where he writes and teaches on Antitrust Law and Economics. Professor Elhauge is author of *U.S. Antitrust Law & Economics*, co-author of *Global Antitrust Law & Economic*, co-author of *Antitrust Law, Vol X* with Areeda, Elhauge & Hovenkamp, editor of the *Research Handbook on the Economics of Antitrust Law*, and the author of articles on antitrust law and economics that have won awards and appeared in peer-reviewed economics journals and top law reviews. He is also President of Legal Economics, LLC, former FTC Special Employee on Antitrust Issus, member of the editorial board for the Competition Policy International, and member of the advisory boards for the Journal of Competition Law & Economics and for the Social Sciences Research Network on Antitrust Law & Policy.

- **Eleanor M. Fox**, Walter J. Derenberg Professor of Trade Regulation at New York University School of Law. She was awarded an inaugural Lifetime Achievement Award in 2011 by the *Global Competition Review* for "substantial, lasting, and transformational impact on competition policy and practice." She received the inaugural award for outstanding contributions to the competition law community in 2015 by the Academic Society for Competition Law, the world network of academic law and economic competition experts.

- **Stephen Calkins**, Professor of Law, Wayne State University. Professor Calkins is the author of one of the seminal Antitrust text books – *Antitrust Law: Policy and Practice* (4th ed. 2008) (with C. Paul Rogers III, Mark R. Patterson and William R. Andersen). He is also the author of *Antitrust Law and Economics in a Nutshell* (5th ed. 2004) (with Ernest Gellhorn and William Kovacic) and served as a co-editor of the *ABA Antitrust Section, Consumer Protection Law Developments* (2009). Professor Calkins is a life member of the American Law Institute, a fellow of the American Bar Foundation and a member of the advisory boards for the American Antitrust Institute, Sedona Conference and National State Attorneys General Program Advisory Project at Columbia Law School. For the American Bar Association, he has served on the Councils

of the Sections of Administrative Law and Regulatory Practice and the Section of Antitrust Law (two, three- year terms). He is a former chair of the Association of American Law School's Antitrust and Economic Regulation Committee.

- **Tim Wu**, Professor of Law, Columbia Law School. Professor Wu has cauthored several books, including "Network Neutrality Broadband Discrimination" (2003), Who Controls the Internet (2006), The Master Switch (2010), and The Attention Merchants (2016). Wu was a law clerk for Justice Stephen Breyer and Judge Richard Posner, and has also worked at the White House National Economic Council, at the Federal Trade Commission, for the New York Attorney General, and in the Silicon Valley telecommunications industry.

- **Barak Richman**, Edgar P. and Elizabeth C. Bartlett Professor of Law and Professor of Business Administration at Duke University. He previously served as a law clerk to Judge Bruce M. Selya of the United States Court of Appeals for the First Circuit, and from 1994-1996 he handled international trade legislation as a staff member of the United States Senate Committee on Finance. He writes regularly on issues related to economics and antitrust. Professor Richman is the author of Stateless Commerce, which was published by Harvard University Press.

- **Thomas Greany**, Visiting Professor, UC Hastings College of Law. Professor Greaney was the Chester A. Myers Professor of Law and Director of the Center for Health Law Studies at Saint Louis University School of Law. Prior to joining the SLU Law faculty, he served as an Assistant Chief in the Department of Justice, Antitrust Division, specializing in health care antitrust litigation, and completed a visiting professorship at Yale Law School.

- **Peter Carstensen**, Fred W. & Vi Miller Chair in Law Emeritus, University of Wisconsin Law School. He previously served as an attorney in the Antitrust Division of the United States Department of Justice. Professor Carstensen is also a Senior Fellow of the American Antitrust Institute.

- **Spencer Weber Waller**, Interim Associate Dean for Academic Affairs, Professor and Director for Consumer Antitrust Studies at Loyola University of Chicago, School of Law.

- **Darren Bush**, Professor of Law and Law Foundation Professor, University of Houston Law Center. Professor Bush served as a co-author with Harry First and the late John J. Flynn on the antitrust casebook FREE ENTERPRISE AND ECONOMIC ORGANIZATION: ANTITRUST (7th Ed.) with Foundation Press.

- **Chris Sagers**, James A. Thomas Distinguished Professor of Law. He is a member of the American Law Institute, a Senior Fellow of the American Antitrust Institute, and a leadership member of the ABA Antitrust Section.

- **Robert H. Lande**, Venable Professor of Law, University of Baltimore School of Law. Professor Lande is a co-founder and a Director of the American Antitrust Institute, a past chair of the AALS Antitrust Section, and has held many positions in the ABA Antitrust Section. He is also an elected member of the American Law Institute.

- **Robin Feldman**, Harry & Lillian Hastings Professor of Law & Director of the Institute for Innovation Law, U.C. Hastings College of Law. Professor Feldman previously chaired the Executive Committee of the Antitrust Section of the American Association of Law Schools and clerked for The Honorable Joseph Sneed of the U.S. Court of Appeals for the Ninth Circuit. She is also a Fellow of the American Antitrust Institute.

- **Jeffrey Harrison**, Huber C. Hurst Eminent Scholar Chair in the Levin Collage of Law at the University of Florida. He is the co-author of Understanding Antitrust and its Economic Implications, (6th ed., Matthew Bender, 2013) with E.T. Sullivan.

Professor Harrison's casebook on Law and Economics is in the third edition. His Nutshell on Law and Economics is in its sixth edition.

- **John B. Kirkwood**, Professor of Law, Seattle University School of Law. He is a Senior Fellow of the American Antitrust Institute and an Adviser to the Institute of Consumer Antitrust Studies. Professor Kirkwood previously directed the Planning Office, the Evaluation Office, and the Premerger Notification Program at the FTC's Bureau of Competition in Washington, D.C. and later managed cases and investigations at the Northwest Regional Office.

- **Joshua P. Davis**, Associate Dean for Academic Affairs, Director of the Center for Law and Ethics, Professor, and Dean's Circle Scholar, University of San Francisco, School of Law. Dean Davis is on the board for the American Antitrust Institute, and he previously served as a Fellow at the Center for Applied Legal Studies at Georgetown University Law Center and as the clerk to the Hon. Patrick E. Higginbotham on the Fifth Circuit Court of Appeals.

- **Norman W. Hawker**, Professor of Finance and Commercial Law, Western Michigan University. He is also a Senior Fellow of the American Antitrust Institute.

- **Max Huffman**, Professor of Law and Director of Corporate and Commercial Law Graduate Certificate program, University of Indiana, Rober H. McKinney School of Law.

- **Warren Grimes**, Associate Dean for Research and Irving D. and Florence Rosenberg Professor of Law, Southwestern Law School. Dean Grimes is co-author of the definitive antitrust law text for lawyers and law students, *The Law of Antitrust: An Integrated Handbook* with the late Professor Lawrence Sullivan. Dean Grimes has chaired the Los Angeles County Bar Association Antitrust and Trade Regulation Section and is a member of the Executive Committee, and he serves on the Advisory Board of the American Antitrust Institute.

- **Mark R. Patterson**, Professor of Law, Fordham University School of Law. Professor Patterson has also been a visiting professor at several law schools in the U.S. and at Bocconi University in Milan. He was a co-author of *Antitrust Law: Policy and Practice* (4th ed. 2008) (with C. Paul Rogers III, Stephen Calkins, and William R. Andersen) and is the author of the forthcoming book Antitrust Law in the New Economy: Google, Yelp, LIBOR, and the Control of Information (Harvard 2017).

- **Marina Lao**, Professor of Law, Seton Hall Law. Professor Lao was previously awarded a Fulbright Fellowship. She currently serves as a member of the advisory board of the American Antitrust Institute, and was Chair of the Section of Antitrust and Economic Regulation of the Association of American Law Schools.

- **Michael A. Carrier**, Professor of Law, Rutgers Law School. Professor Carrier is a co-author of the leading IP/antitrust treatise, *IP and Antitrust Law: An Analysis of Antitrust Principles Applied to Intellectual Property Law* (2d ed. 2009, and annual supplements, with Hovenkamp, Janis, Lemley, and Leslie). He is a member of the Board of Advisors of the American Antitrust Institute and is a past chair of the Executive Committee of the Antitrust and Economic Regulation section of the Association of American Law Schools.

- **Edward Cavanagh**, Professor of Law, St. John's University. Professor Cavanagh is currently a member of the Council of the ABA Antitrust Section. He has previously served as co-chair of the ABA Antitrust Section Public Service Committee. He has also served as co-chair of the Antitrust Section's Civil Practice and Procedure Committee. Professor Cavanagh is a past chair of the New York State Bar Association Antitrust Section and currently a member of its Executive Committee.

Professor Cavanagh is a member of the Association of the Bar of the City of New York and has served on its Antitrust and Trade Regulation Committee and its Federal Courts Committee

- **Barak Orbach**, Professor of Law and Director of the Business Law program, University of Arizona, James E. Rogers College of Law. Professor Orbach is the author of a leading casebook: *Regulation: Why and How the State Regulates* (Foundation Press, 2012). Professor Orbach previously served as an Advisor for Law & Economics to the Israeli Antitrust Commissioner.

- **Jon Baker**, Research Professor of Law at American University Washington College of Law. Professor Baker served as the Chief Economist of the Federal Communications Commission from 2009 to 2011, and as the Director of the Bureau of Economics at the Federal Trade Commission from 1995 to 1998. Previously, he worked as a Senior Economist at the President's Council of Economic Advisers, Special Assistant to the Deputy Assistant Attorney General for Economics in the Antitrust Division of the Department of Justice, an Attorney Advisor to the Acting Chairman of the Federal Trade Commission, and an antitrust lawyer in private practice. Professor Baker is the co-author of an antitrust casebook, a past Editorial Chair of Antitrust Law Journal, and a past member of the Council of the American Bar Association's Section of Antitrust Law. He has published widely in the fields of antitrust law, policy, and economics.

- **Andrew Chin**, Professor of Law, University of North Carolina School of Law. Professor Chin is the recipient of a Rhodes Scholarship and a National Foundation Graduate Fellowship. He clerked for Judge Henry H. Kennedy Jr. of the United States District Court for the District of Columbia and assisted Judge Thomas Penfield Jackson and his law clerks in the drafting of the findings of fact in United States v. Microsoft Corporation.

- **Thomas J. Horton**, Professor of Law and Heidepriem Trial Advocacy Fellow at the University of South Dakota School of Law.

No. 16-1454

In The Supreme Court of the United States

STATES OF OHIO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MONTANA, RHODE ISLAND, UTAH, AND VERMONT,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, AND AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR UNITED STATES PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND, INC., CENTER FOR RESPONSIBLE LENDING, CONSUMER FEDERATION OF AMERICA, CONSUMERS UNION, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, NATIONAL CONSUMER LAW CENTER AND PUBLIC CITIZEN, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MICHAEL LANDIS
U.S. PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND, INC.
1543 Wazee Street, Suite 400
Denver, Colorado 80202
(303) 573-5995
mlandis@pirg.org

Counsel for U.S. Public Interest Research Group Education Fund, Inc.

SHARON K. ROBERTSON
Counsel of Record
COHEN MILSTEIN SELLERS & TOLL PLLC
88 Pine Street, 14th Floor
New York, New York 10005
(212) 838-7797
srobertson@cohenmilstein.com

Counsel for Amici Curiae

[Additional Counsel Listed On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

GEORGE P. SLOVER
CONSUMERS UNION
1101 17th Street N.W.,
Suite 500
Washington, D.C. 20036
(202) 462-6262
gslover@consumer.org
Counsel for Consumers Union

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INTEREST OF *AMICI CURIAE*

Amici curiae are leading not-for-profit consumer advocacy organizations, with broad knowledge about consumers' use of credit cards. *Amici* are particularly well qualified to assist the Court in understanding how the public interest, and consumer interests in particular, are undermined by anticompetitive restraints against merchants, such as the restraints at issue here.[1]

United States Public Interest Research Group Education Fund, Inc. ("U.S. PIRG Education Fund") is a 501(c)(3) independent, non-partisan organization that works on behalf of consumers and the public interest. Through research, public education, and outreach, it serves as a counterweight to the influence of powerful special interests that threaten the public's health, safety, or well-being. U.S. PIRG Education Fund participates as *amicus curiae* in cases that will have a substantial impact on consumers and the public interest, such as this one. U.S. PIRG Education Fund has long advocated on the issue of swipe fee reform, believes that cash customers should not pay more to subsidize credit card reward programs, and supports

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[1] Counsel for *amici* files this brief with consent of the parties, whose blanket consents are on file with the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

efforts to make the costs of credit transparent to consumers.

The Center for Responsible Lending ("CRL") is a non-profit policy, advocacy, and research organization dedicated to exposing and eliminating abusive practices in the market for consumer financial services and to ensuring that consumers may benefit from the full range of consumer protection laws designed to inhibit unfair and deceptive practices by banks and other financial services providers. CRL is an affiliate of Self-Help, one of the nation's largest non-profit community development financial institutions. Since 1980, Self-Help has provided over $7 billion in financing to 131,000 families, individuals and businesses underserved by traditional financial institutions. Through its credit union network, Self-Help's two credit unions serve over 130,000 people in North Carolina, California, Chicago, Florida and Wisconsin and offers a full range of financial products and services. Additionally, CRL issues research and policy reports on a variety of financial products, including credit cards. CRL has broad knowledge of the credit card market and is well situated to assist the court in understanding the impact of merchant restraints on the cost of consumer credit.

Consumer Federation of America ("CFA") is an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. Today, nearly 300 of these groups participate in the federation and govern it through their representatives on

the organization's Board of Directors. As a research organization, CFA investigates consumer issues, behavior, and attitudes through surveys, focus groups, investigative reports, economic analysis, and policy analysis. The findings of such research are published in reports that assist consumer advocates and policymakers as well as individual consumers. As an advocacy organization, CFA works to advance pro-consumer policies on a variety of issues before Congress, the White House, federal and state regulatory agencies, state legislatures, and the courts. As an education organization, CFA disseminates information on consumer issues to the public and news media, as well as to policymakers and other public interest advocates. Since it was formed, ensuring a fair financial marketplace has been a top priority for CFA.

Consumers Union is the policy and mobilization division of Consumer Reports, an expert, independent, non-profit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. It conducts its policy work in the areas of antitrust and competition policy and financial reform, as well as food and product safety, privacy and data security, telecommunications reform, health care reform, and other areas. Consumer Reports is the world's largest independent product-testing organization. Using its dozens of labs, auto test center, and survey research department, the non-profit organization rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million subscribers to its magazine,

website, and other publications. Consumers Union has been actively engaged against the harms caused by anticompetitive credit card practices for many years.

National Association of Consumer Advocates ("NACA") is a non-profit corporation formed in 1994 whose members are lawyers, law professors, and students whose practice or area of study involves consumer protection. NACA's mission is to promote justice for consumers by maintaining a forum for information-sharing among consumer advocates and to serve as a voice for its members and consumers in the struggle to curb unfair and oppressive business practices.

National Consumer Law Center ("NCLC") is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low-income and elderly consumers. Since its founding in 1969, NCLC has been a resource center addressing consumer finance issues affecting equal access to fair credit in the marketplace. NCLC publishes a 20-volume Consumer Credit and Sales Legal Practice Series and has served on the Federal Reserve System Consumer-Industry Advisory Committee, as the Federal Trade Commission's designated consumer representative, and on committees of the National Conference of Commissioners on Uniform State Laws.

Public Citizen, Inc. is a non-profit consumer advocacy organization that appears on behalf of its nationwide membership before Congress, administrative agencies, courts, and state governments on a wide range of issues. Public Citizen works for enactment

and enforcement of laws to protect consumers, workers, and the public and to foster open and fair governmental processes. Public Citizen believes that vigorous enforcement of antitrust laws is critical to protecting consumers against collusive corporate practices that increase prices and diminish consumer choice. Public Citizen and its attorneys have joined in or represented parties to *amicus curiae* briefs in many cases in this Court and others involving antitrust claims. *See, e.g.*, *N.C. Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *Delta Airlines v. Siegel*, No. 16-16401 (11th Cir. appeal pending).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns virtually every dollar that Americans spend on consumer goods and services. The contractual provisions at issue require that the overwhelming majority of the 6.4 million businesses that accept American Express ("Amex") credit cards must not promote any other payment method above Amex cards, imply any preference for other payment methods, or attempt to dissuade anyone from using an Amex card.[2] The restrictions Amex imposes on the sprawling network of merchants who accept its cards

[2] *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 162 (E.D.N.Y. 2015) ("*Amex I*"), *rev'd and remanded*, *United States v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016), *cert. granted*, *Ohio v. Am. Express Co.*, No. 16-1454, 2017 WL 2444673 (Oct. 16, 2017).

are inextricably linked to every consumer transaction – regardless of whether consumers choose to pay with an Amex card, another credit card, a debit card, another form of electronic payment, or cash.

After a seven-week trial, the district court issued a 150-page order holding that Amex's merchant restraints suppress horizontal competition in violation of the Sherman Act. Specifically, the district court held that Amex's merchant restraints have rendered "[p]rice competition . . . a critical avenue of horizontal interbrand competition . . . near[ly] irrelevan[t]."[3] The district court's opinion comports with this Court's repeated admonition that preserving horizontal competition is the principal objective of the antitrust laws.[4] The district court's injunction against Amex's merchant restraints had the potential to restore competition to a market where it has long been in short supply. The Second Circuit nonetheless reversed the district court and ordered judgment in Amex's favor.[5]

The Second Circuit's decision reflects a fundamentally erroneous view of the effects of Amex's merchant restraints. First, the restrictions Amex imposes on its merchant customers stifle price competition to the

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[3] *Amex I*, 88 F. Supp. 3d at 209.

[4] *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 878 (2007); *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724 (1988).

[5] *United States v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016) ("*Amex II*"), *cert. granted*, *Ohio v. Am. Express Co.*, No. 16-1454, 2017 WL 2444673 (Oct. 16, 2017).

detriment of consumers.[6] Second, the Second Circuit's opinion improperly contradicts the district court's factual findings without determining that they were clearly erroneous. Without this Court's intervention, the Second Circuit's decision could be invoked across a range of industries to shelter anticompetitive conduct from appropriate scrutiny under the antitrust laws.

ARGUMENT

I. Merchant Restraints Suppress Price Competition And Harm Consumers.

Most adult Americans hold at least one credit card, and the average consumer holds nearly four such cards.[7] In 2015, there were approximately $3.16 trillion in credit card purchases in the United States, representing nearly 34 billion credit card transactions.[8] In September 2017, Americans collectively held over one trillion dollars in revolving credit card debt, approaching the previous record sum of $1.02 trillion, recorded

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[6] Although the relevant market for *antitrust purposes* is the merchant services market, *see* Pet'rs Br. 11, the point remains that a reduction in competition in the merchant services market results in harm to consumers *on top of* – and *as a result of* – supra-competitive merchant prices.

[7] Consumer Financial Protection Bureau, *The Consumer Credit Card Market* 11 (2015), *available at* http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf.

[8] The Federal Reserve, *The Federal Reserve Payments Study 2016* (2016), *available at* https://www.federalreserve.gov/newsevents/press/other/2016-payments-study-20161222.pdf.

in April 2008.[9] The number of credit card transactions in the U.S. grew at an annual rate of 8.0 percent from 2012 to 2015.[10] Simply put, credit cards are vitally important in the economic lives of American consumers.

Merchants incur a fee each time a consumer chooses to pay with a credit card. Since consumers make this choice tens of billions of times a year, the fees add up. In 2016 alone, U.S. merchants paid $88.39 billion in fees to credit card companies.[11] Many merchants that accept Amex cards sustain fees in excess of 3 percent of the amount of each credit transaction. Given that the average general retailer in the U.S. operates with a 2.60 percent net margin,[12] merchant fees are a highly significant feature of the consumer retail market.

Other credit cards carry markedly lower merchant fees. Yet merchants are contractually barred from educating consumers about the actual cost of using particular credit cards – and are barred from so much as *mentioning* Amex's high merchant fees – at the point

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[9] *See* The Federal Reserve, *Consumer Credit Outstanding (Levels)* (Nov. 7, 2017), *available at* https://www.federalreserve.gov/releases/g19/hist/cc_hist_sa_levels.html.

[10] Federal Reserve Payments Study, *supra* note 8.

[11] *See U.S. Merchants Paid $88.39 Billion in Card Fees in 2016*, Nilson Rep. (May 2017), *available at* http://www.prweb.com/releases/prweb14347691.htm.

[12] *See* NYU Stern School of Business, *Margins by Sector* (Jan. 2017), *available at* http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/margin.html.

of sale.[13] Merchants are likewise restricted by Amex's rules from setting different prices based on whether consumers pay with an Amex card or another credit card.[14] These restraints inoculate Amex against price competition from other credit card companies. Amex admitted as much at trial.[15]

Absent price competition, Amex's competitors do not benefit from maintaining relatively low merchant fees. As a result, when Amex raises its fees, other credit card companies tend to follow suit.[16] The district court found that Amex has been able to impose a steady succession of fee increases on merchants without fear of significant merchant attrition.[17] The result is artificially elevated and ever-escalating credit card costs for merchants, which in turn drives up prices for consumers.[18]

The harm to consumers from supra-competitive prices is not theoretical.[19] For example, a major U.S. airline testified that its credit card fee costs were *twice* as much as its domestic labor costs.[20] And though Amex

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[13] *Amex I*, 88 F. Supp. 3d at 162.

[14] *Id.*

[15] *See* Trial Transcript ("Tr.") 2596:2-2597:5, 2668:23-2669:3.

[16] *Amex I*, 88 F. Supp. 3d at 216-17.

[17] Tr. 244, 569-70, 1608-09, 2407-10, 2414-15.

[18] Zhu Wang, Federal Reserve Bank of Kansas City, *Market Structure and Credit Card Pricing: What Drives the Interchange?* 7 (2007), *available at* http://www.frbatlanta.org/news/CONFEREN/08payments/08payments_Wang.pdf.

[19] *Amex I*, 88 F. Supp. 3d at 216-24.

[20] Tr. 2440:23-2441:3.

customers receive cardholder rewards which may compensate *them* for higher retail prices – to some extent – the overwhelming majority of consumers – those who use cash, debit cards, other less expensive credit cards, or electronic benefit cards – face higher prices without any reciprocal benefit.[21]

These other consumers effectively subsidize Amex cardholder benefits and Amex profits. In an analysis focused on gasoline and grocery purchases, the Federal Reserve Bank of Boston estimates that the subsidy from low-income card users to better-heeled "rewards card" users totals between $1.4 billion and $1.9 billion each year.[22] The district court noted the unfair regressive nature of this transfer: "a lower-income shopper who pays [for] groceries with cash or through [electronic benefits transfer] . . . is subsidizing, for example, the cost of the premium rewards conferred by American Express on its relatively small, affluent cardholder base."[23]

Prohibiting merchants from being open about the costs of accepting different payment methods, and factoring those costs into their pricing, also makes it more difficult for consumers to factor those costs into their

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[21] *Amex I*, 88 F. Supp. 3d at 215-17.

[22] Scott Schuh et al., Federal Reserve Bank of Boston, *Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations* 3 n.6 (2010), *available at* https://www.bostonfed.org/economic/ppdp/2010/ppdp1003.pdf.

[23] *Amex I*, 88 F. Supp. 3d at 216-17.

purchasing decisions.[24] The result is more use, of more expensive credit cards, than would otherwise occur. Uneconomical credit card use leads in turn to diminished consumer purchasing power, less saving, greater borrowing, more borrowing-related fees, and higher levels of indebtedness than would be present in a more efficient and competitive market.[25] Further still, merchant restraints heighten the barriers to entry for mobile electronic payment businesses and other would-be market participants, who could bring lower-cost options into the marketplace, by obscuring the true costs of credit cards, thereby neutralizing any cost advantages that new entrants could bring to bear in the marketplace.[26]

If Amex were unable to use its market leverage to impose these anticompetitive restrictions on merchants, merchants would be free to communicate with consumers about lower-cost payment methods and

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[24] *See* Steven Semeraro, *Assessing the Costs & Benefits of Credit Card Rewards: A Response to Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations*, 25 Loy. Consumer L. Rev. 30, 47-59 (2012); *see also Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756, 784-85 (1999) (Breyer, J., concurring in part and dissenting in part) ("To restrain truthful advertising about lower prices is likely to restrict competition in respect to price – 'the central nervous system of the economy.'") (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940)).

[25] William W. Shaw, A Question of Integrity, Credit Card Mgmt., Feb. 2005, at 48. In general, credit card reward programs encourage consumers to shift to more expensive payment methods.

[26] Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1386 (2008).

offer consumers incentives to use them. Amex would then be subject to competitive pressure to lower its merchant fees. Consumers would enjoy lower prices across the board, with the greatest benefits flowing to the lower end of the income spectrum, where consumers have to live on a budget. Unless the decision below is reversed, American consumers will continue to suffer from artificially elevated retail prices and hidden subsidization of costly high-end "reward" programs that ultimately benefit mostly Amex.

II. The Second Circuit's Opinion Fails to Accord the Requisite Deference to the District Court's Findings of Fact.

After a lengthy trial during which dozens of witnesses testified and a voluminous evidentiary record was developed, the district court found that the restraints Amex imposed on merchants spurred prices upward for *all* consumers and thwarted price competition among credit card companies.[27] The Second Circuit reached a somewhat different conclusion: that Amex's merchant restraints "protect[ ]" its merchant-fee revenue and thereby "affect competition[.]"[28] The Second Circuit also emphasized that disallowing merchant restraints could diminish "the optimal level of cardholder benefits, which in turn may reduce the intensity of competition among payment-card networks

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[27] *Amex I*, 88 F. Supp. 3d at 150-51.

[28] *Amex II*, 838 F.3d at 205.

on the cardholder side of the market."[29] In a footnote, the Second Circuit declared that the district court erred by failing to account for the cardholder benefits that many Amex customers enjoy.[30]

This assertion cannot be squared with the district court's findings of fact. The district court wrote that "[Amex] executed a series of targeted [merchant fee] increases . . . with the stated purpose of better aligning its prices with the value it perceived as being delivered to both cardholders and merchants[ ]" but failed to "pair [increased revenues from increased merchant fees] with offsetting adjustments on the cardholder side of the platform. . . ."[31] In other words, the district court found that Amex failed to even apportion the additional revenue from increased merchant fees to cardholder rewards.

Moreover, the fact that a select subset of consumers might receive benefits – the Amex cardholders' kickback "rewards" – does not justify the harm inflicted on consumers more broadly through the higher retail prices they pay as a result of the higher credit card fees merchants are forced to incur.

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[29] *Id.* It bears mentioning that there is no factual *or legal* basis for this claim. Procompetitive effects in one market cannot authorize anticompetitive restraints on trade in another market. *See Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978).

[30] *Amex II*, 838 F.3d at 204 n.52.

[31] *Amex I*, 88 F. Supp. 3d at 195-96.

The Second Circuit's opinion fails to point to any contrary evidence in the record and does not otherwise attempt any explanation of why the district court's findings are "clearly erroneous." Indeed, the opinion does not account for these findings in any way. Compounding these errors is the footnote that contradicts – indeed, whitewashes – the district court's thorough examination of the record and detailed resultant finding on cardholder benefits.[32]

It may be true that a small number of relatively prosperous credit card holders benefit from Amex's efforts to isolate its high merchant fees from price competition, but the district court also found that *all consumers* were harmed by artificially inflated prices. Yet the Second Circuit's opinion fails to so much as acknowledge the district court's finding that merchant restraints drive up prices for consumers across the board. In so doing, the Second Circuit failed to show the appropriate deference to the district court's factual findings.[33]

The result is that the Second Circuit placed the arguable interest of credit card holders in reaping more cardholder rewards above the interest *all*

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[32] *Amex II*, 838 F.3d at 204 n.52.

[33] *Cf. Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.").

businesses have in meaningful competition with respect to credit card fees, not to mention the interests *all* consumers have in lower prices. Under this logic, a firm can substantially restrain horizontal competition in one market if it can show some possible procompetitive effect in another market – even if anticompetitive effects predominate in other markets as well. There is no basis in fact or law for this view.[34]

CONCLUSION

The decision below should be reversed to prevent a warped understanding of antitrust jurisprudence from spreading and to allay the harm to consumers

[34] *See supra* note 27.

bred by the suppression of price competition in the electronic payments market.

December 14, 2017

Respectfully submitted,

MICHAEL LANDIS
U.S. PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND, INC.
1543 Wazee Street, Suite 400
Denver, Colorado 80202
(303) 573-5995
mlandis@pirg.org

Counsel for U.S. Public Interest Research Group Education Fund, Inc.

GEORGE P. SLOVER
CONSUMERS UNION
1101 17th Street N.W., Suite 500
Washington, D.C. 20036
(202) 462-6262
gslover@consumer.org

Counsel for Consumers Union

SHARON K. ROBERTSON
Counsel of Record
COHEN MILSTEIN SELLERS & TOLL PLLC
88 Pine Street, 14th Floor
New York, New York 10005
(212) 838-7797
srobertson@cohenmilstein.com

Counsel for Amici Curiae

No. 16-1454

IN THE

Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF VERIZON COMMUNICATIONS INC. IN SUPPORT OF NEITHER PARTY

DAVID E. WHEELER
VERIZON COMMUNICATIONS INC.
1320 North Courthouse Road
Arlington, VA 22201
(703) 351-3155

THOMAS R. MCCARTHY
Counsel of Record
BRYAN K. WEIR
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201
(703) 243-9423
tom@consovoymccarthy.com

Counsel for Amicus Curiae

December 14, 2017

277687

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INTEREST OF *AMICUS CURIAE*[1]

Verizon Communications Inc., through its subsidiaries, (collectively, "Verizon") is a global leader in delivering innovative communications and technology solutions to consumer, business, government, and wholesale customers and provides integrated business solutions to customers in more than 150 countries.

Verizon regularly appears before the Court, both as a party and as an *amicus curiae*, including in cases involving antitrust law issues. *See, e.g.*, *Pac. Bell Tel. Co. v. LinkLine Communications, Inc.*, No. 07-512 (2009); *Bell Atlantic Corp. v. Twombly*, No. 05-1126 (2007); *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, No. 02-682 (2004); *NYNEX Corp. v. Discon, Inc.*, 96-1570 (1998).

Verizon participates in multi-sided markets both as a provider of connective platforms and as a market participant relying on a platform for connection. Verizon businesses rely on platform services from the credit card payment systems in Verizon-owned stores to the operating systems that run on mobile devices and connect Verizon subsidiaries' applications to consumers. Consumers access third-party content over Verizon's Fios and mobile services. Verizon's applications from its Oath subsidiary (such as Yahoo! Sports) act as an intermediary between

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1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

content providers and consumers in the digital world. Verizon is also itself a platform provider. ThingSpace is Verizon's web-based Internet of Things platform that provides a workspace for developers to create applications and services for customers with connected IoT devices that are served by Verizon's network. BrightRoll by Yahoo! provides programmatic tools to help buyers and sellers connect with consumers across ad formats and devices, and ONE by AOL provides a mobile monetization platform that connects publishers, advertisers, and consumers to enable these groups to connect. In short, platforms support Verizon's business, and in many instances, they are Verizon's business.

Verizon thus has a strong interest in the proper application of the antitrust laws and the Court's antitrust jurisprudence and, most relevant here, a heightened interest in how the Court applies those laws and precedent to multi-sided markets. Although some markets with two or more sides have existed for some time now (*e.g.*, newspapers), our modern economy has seen an explosion in the development of multi-sided markets. It is only recently that economic theory has focused on these complex markets; likewise, it is only recently that courts have considered their antitrust implications. Not surprisingly, then, there is no generally accepted guidance in the law or economic theory about how they should be treated under the antitrust laws. The Court thus should proceed cautiously here to avoid impairing pro-competitive behavior and harming consumer welfare in the process.

Verizon expresses no opinion on the merits of the case. Rather, Verizon writes to respectfully request that the Court refrain from issuing any broad pronouncements on

novel issues of antitrust law in this case and instead decide only the particular dispute between these parties based on the specific facts and circumstances presented here.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case requires the Court to apply the Sherman Act to the two-sided market in the credit-card industry. Given the diversity and complexity of two-sided markets, that is a daunting task—especially since neither the law nor economic theory provides any meaningful guidance on the issue. Other than in this case, no federal appellate court has squarely considered the application of the antitrust laws to two-sided platforms (much less, even more complicated multi-sided markets). For all practical purposes, then, this Court will be writing on a blank slate. This is a risky proposition in the antitrust arena, because "[m]uch of the time ... it is unclear whether particular business conduct will promote consumer welfare, harm it, or leave it undisturbed." Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 Wm. & Mary L. Rev. 75, 82 (2010).

In the absence of guidance and practical experience in dealing with two-sided markets, the risk of error—false positives or false negatives—is great. And the cost of such errors is substantial; they "are harmful to the economy as a whole for reasons that go beyond the conduct in the case under review." Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 Antitrust L.J. 1, 5 (2015). Moreover, multi-sided markets vary wildly in their structures and in how their interdependent markets relate to each other. They thus are not susceptible to one-size-fits-all economic analysis.

Accordingly, the Court should proceed cautiously here, deciding only the case before it on the facts presented, so as to minimize the possibility of error and avoid impairing the development of multi-sided markets.

The Two-Sided Market For Credit Cards. This case concerns the credit-card industry, a highly "complex industry involving various commercial structures performing various essential functions." Pet. App. 5a. Each of the millions and millions of daily credit-card transactions "necessarily involves a multitude of economic acts and actors," *id.*, that are perhaps best illustrated by a simple example offered by the court below:

> Take, for example, a cardholder who pulls into a gas station to refuel her car. The cardholder takes out her credit card—for which she pays an annual fee while also receiving frequent flyer miles on her favorite airline for every dollar spent—inserts the card into the credit-card slot on the gas pump, and fills her tank with gas. Her credit card is immediately charged for the transaction, and the station owner receives payment quickly—minus a fee.

Id.

This transaction requires economic actors to undertake the various responsibilities of issuing the credit card that is inserted into the pump; extending credit to the cardholder filling her gas tank; paying the gas station retailer who accepts the card; and collecting payment from the cardholder. Those responsibilities "can be vested in one firm or in a multiplicity of firms engaged in a division

of specified functions and connected in a network by contractual arrangements." Pet. App. 5a-6a. And each time a customer engages in a transaction like this, the merchant (in some way or another) pays a fee—commonly known as a "discount rate" or "merchant discount rate"—for the privilege of accepting the credit card used by the customer. Pet. App. 13a-14a.

These interdependent economic acts and actors result in what economists and scholars have termed a "two-sided market." *See, e.g.*, Lapo Filistrucchi *et al.*, *Market Definition in Two-Sided Markets: Theory and Practice*, Tilburg Law School Legal Studies Research Paper Series 5 (2013), https://goo.gl/rXabfC.[2] Cardholders benefit from holding a credit card that is accepted by a wide range of merchants, and merchants benefit from accepting a credit card that is used by a large number of cardholders. The two sides—cardholders and merchants—thus depend upon each other and upon widespread acceptance of a credit card. Pet. App. 69a ("[C]redit card networks cater to the needs of two distinct sets of consumers, merchants and

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2. Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 Rand J. Econ. 645, 664-65 (2006) ("[A] market is two-sided if the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount; in other words, the price structure matters, and platforms must design it so as to bring both sides on board."). Two-sided markets are sometimes referred to as "two-sided platforms" or by the shorthand "2SPs."

Some markets may have more than two sides; the term "multi-sided markets" is often used to describe these complex markets more generally. *See, e.g.*, David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 Yale J. on Reg. 325, 328 (2003).

cardholders. Their very function is to bring these two sides together to consummate value-generating transactions.").

Proceedings Below. This case began in 2010, when the United States and seventeen States brought an enforcement action against Respondent American Express ("Amex") in the Southern District of New York alleging anti-competitive behavior in violation of the Sherman Antitrust Act. Pet. App. 66a-67a.[3] The complaint attacked contractual provisions in Amex's merchant agreements that prevent merchants who accept its credit cards from steering customers to alternative card brands (sometimes characterized as "anti-steering" or "non-discrimination" provisions).[4] After a seven-week bench trial, the district court held that these provisions were an unlawful restraint on trade and issued a permanent injunction barring Amex from using them in its merchant card agreement. Pet. App. 63a-320a.

In reaching that result, the district court found that the credit-card industry's "two-sided platform comprises at least two separate, yet deeply interrelated, markets: a market for card issuance, in which Amex and Discover compete with thousands of Visa- and MasterCard-issuing banks; and a network services market, in which Visa, MasterCard, Amex, and Discover compete to sell acceptance services." Pet. App. 70a. For antitrust purposes, the court found the relevant market to be only the market for "network services," that is, the merchant

3. Visa and MasterCard were also sued as defendants in this action, but they settled.

4. Amex typically charges merchants higher discount rates than other credit-card companies. Pet. App. 19a.

side of the two-sided platform. Pet. App. 122a. The district court found that Amex had market power in this market in part because of "the insistence of [its] cardholder base on using their [Amex] cards" when purchasing goods and services, and found that the provision caused anticompetitive injury to merchants in the form of higher merchant discount fees. Pet. App. 71a. In light of these findings, the district court placed the burden on Amex to establish procompetitive benefits, and further found that Amex had not met that burden. Pet. App. 228a-258a.

In making these findings, the district court "recognize[d] that it does not possess the experience or expertise necessary to advise, much less dictate to, the firms in this industry how they must conduct their affairs as going concerns." Pet. App. 69a. Highlighting the "complex[ity]" of the credit-card industry and the fact that "it is a critical component of commerce in this United States," the district court expressed its "concerns about disrupting the competitive landscape in such a concentrated, complex market" and emphasized that it "d[id] not come to its decision in this case eagerly or easily." Pet. App. 68a-69a, 248a.

Amex appealed to the Second Circuit. The case received significant attention on appeal, as numerous economists and antitrust professors (among others) filed *amicus curiae* briefs on both sides of the case. After briefing and argument, the Second Circuit reversed and directed the entry of judgment in favor of Amex. The Second Circuit held that the district court "erred in excluding the market for cardholders from its relevant market definition." Pet. App. 32a. The Second Circuit criticized the district court for "ignor[ing] the two

markets' interdependence," thereby "allow[ing] legitimate competitive activities in the market ... to be penalized no matter how output-expanding such activities may be." Pet. App. 35a. To the appellate court, the relevant market encompasses both sides of the two-sided market for credit-card payments. Pet. App. 32a-35a.

The Second Circuit likewise disagreed with the district court regarding market power. Pet. App. 40a-48a. Specifically, the Second Circuit concluded that the district court erred in premising its market power finding on "cardholder insistence." Pet. App. 45a-48a. To the appellate court, "[c]ardholder insistence results not from market power, but instead from competitive benefits on the cardholder side of the platform and the concomitant competitive benefits to merchants who choose to accept Amex cards." Pet. App. 45a; *id.* at 45a-46a ("Cardholder insistence is exactly what makes it worthwhile for merchants to accept Amex cards—and thus cardholder insistence is exactly what makes it worthwhile for merchants to pay the relatively high fees that Amex charges.").

The appellate court further concluded that the plaintiffs had failed to make a prima facie case under the rule of reason because their proof had only accounted for the competitive effect on one side of the market—merchants—and not on cardholder side of the market. Pet. App. 49a-53a; *id.* at 49a ("The District Court's erroneous market definition caused its anticompetitive effects finding to come up short, for it failed to consider the two-sided net price accounting for the effects of the NDPs on both merchants and cardholders.").

The State of Ohio, along with ten other States, filed a petition for certiorari in this Court. That petition presented the question whether, under the "rule of reason," the governments' showing that Amex's anti-steering provisions stifle price competition on the merchant side of the credit-card platform suffices to prove anti-competitive effects and thereby shifts to Amex the burden of establishing any pro-competitive benefits from the provisions.

The United States filed a brief in opposition to the petition ("USA BIO"). The United States agreed with Ohio that the Second Circuit had erred, but it urged the Court to deny the petition. The United States highlighted the complexity of the market structure and explained that "the Court has not squarely considered questions of market-definition or proof of anticompetitive effects in cases involving two-sided platforms." USA BIO at 19. It added that "no other court of appeals has specifically considered the application of the Sherman Act to two-sided platforms either" and argued that "percolation in the lower courts" would aid the Court "in its application of general antitrust principles to two-sided platforms and to agreements of the sort at issue here." *Id.* at 19-21. The Court nevertheless granted the petition.

ARGUMENT

Amicus shares many of the concerns expressed by the United States in its brief in opposition to the petition. In particular, given that both economic theory and the law relating to two-sided markets are underdeveloped, *Amicus* has serious concerns about the Court taking any action in this case broader than necessary to reach a decision regarding the parties and facts before the Court.

Judicial evaluation of market behavior to determine whether it is pro- or anti-competitive is a complex and difficult enterprise. There thus is a substantial risk of error in this arena. And the costs of such errors can be great. *See* Baker, *supra*, at 5-6; Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 Antitrust L.J. 435, 449 (2006).

The stakes are particularly high in this Court, as any ruling that extends past the conduct and parties in this case will endorse or restrain economic behavior across the country and preclude helpful percolation on those issues in the lower courts. *See* Popofsky, *supra*, at 449 ("Error costs can cause deviations from optimal deterrence because 'a decision by a court will not only bind the litigating parties, but will also serve as precedent by which future conduct will be judged.'") (quoting C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 Antitrust L.J. 41, 51 (1999)). Accordingly, the Court should proceed with caution. *Amicus* respectfully requests that the Court refrain from issuing any broad pronouncements on novel issues of antitrust law in this case and instead decide only the particular dispute between these parties based on the specific facts and circumstances presented here.

I. Consistent With Antitrust Law's Protection Of Competition, The Court Should Follow A Policy Of Nonintervention When It Is Unclear Whether Challenged Conduct Is Pro- Or Anti-Competitive.

When enforcing the antitrust laws, the Court should take care to do "as little injury as possible to the interest

of the general public." *United States v. E. I. du Pont De Nemours & Co.*, 366 U.S. 316, 327-28 (1961); *cf. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004). Such a cautionary approach is warranted because it is often difficult to determine whether "particular business conduct will promote consumer welfare, harm it, or leave it undisturbed." Devlin & Jacobs, *supra*, at 82.

The costs of erroneous judicial decisions are substantial: "False positives and false negatives are harmful to the economy as a whole for reasons that go beyond the conduct in the case under review: False positives and false negatives may chill beneficial conduct by other economic actors (potentially in other industries) that must comply with the rule; these errors may also fail to deter harmful conduct by other economic actors to which the same rule would apply." Baker, *supra*, at 5-6.

Because erroneous decisions "can deter conduct that may be desirable, or prevent challenges to undesirable conduct," Popofsky, *supra*, at 449, when enforcing the Sherman Act, the Court should rule on the basis of the facts in a given case rather than make broad pronouncements on novel issues of antitrust law that may proscribe (or endorse) categories of activity for all time. The Court's gradual move away from *per se* liability with regard to vertical restraints reflects just such a cautionary approach. *See Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 901 (2007) ("In more recent cases the Court, following a common-law approach, has continued to temper, limit, or overrule once strict prohibitions on vertical restraints."); *see also State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Business Electronics Corp. v.*

Sharp Electronics Corp., 485 U.S. 717 (1988); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

In order to avoid harming the consumer public, the Court should follow a policy of "nonintervention" when it is unclear whether particular market activity is pro- or anti-competitive. Robert H. Bork, *The Antitrust Paradox* 133 (1978). This is especially true in the context of novel markets and business arrangements where courts "are forced to formulate doctrine in the dark." Devlin & Jacobs, *supra*, at 83.

II. The Court Should Proceed Cautiously Here Given That Two-Sided Markets Are Complex, Without Clear Legal Or Economic Guidance, And Not Susceptible To One-Size-Fits-All Analysis.

"The concept of two-sided markets in economics is relatively new." *US Airways, Inc. v. Sabre Holdings Corp.*, 11-cv-2725, 2017 WL 1064709, at *8 (S.D.N.Y. Mar. 21, 2017). As the Second Circuit noted in this case, two-sided markets were not even clearly identified in academic literature until the 2000s. Pet. App. 7a-8a n.3. More attention has been paid to two-sided markets (and more complex multi-sided markets) in recent years. *See* David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 Colum. Bus. L. Rev. 667, 679 (2005) ("The body of theoretical economics literature on 2SPs is relatively new."); Daniel M. Tracer, *Overcharge But Don't Overestimate: Calculating Damages for Antitrust Injuries in Two-Sided Markets*, 33 Cardozo L. Rev. 807, 814-15 (2011) (noting the uptick in "legal-scholarly attention given to the unique economic nature of the topic").

But scholarly work in this area has not yielded any clear guidance on their antitrust implications. "Many of the theoretical results in the literature to date are ... based on quite abstract models of how industries operate and on special assumptions regarding demand and cost," and there has been "little rigorous empirical research on 2SPs or competition among them." Evans & Noel, *supra*, at 701. On top of that, the scholarly work that has been done in this area "suggest[s] that 2SP businesses are highly dependent on the specific institutions and technologies within an industry," *id.*, making it risky to make broad generalizations across those institutions and technologies.

One thing scholars can agree on, however, is that analyzing two-sided markets is a complicated endeavor. *See, e.g.*, D. Daniel Sokol, *Troubled Waters Between U.S. and European Antitrust*, 115 Mich. L. Rev. 955, 966 (2017) ("This market structure complicates traditional antitrust analysis."); Evans & Noel, *supra*, at 668 ("Economists have shown that the economic principles that govern the diverse industries based on 2SPs differ from those that govern traditional industries in several important ways."). In particular, "[m]arket definition analysis in situations involving 2SPs can be quite complicated." Jith Jayaratne, Janusz A. Ordover, *Economics and Competition Policy: A Two-Sided Market?*, Antitrust, Fall 2012, at 78.

Not surprisingly, then, the law is thin and unsettled in this area. *See* Andrew Langford, *Gmonopoly: Does Search Bias Warrant Antitrust or Regulatory Intervention?*, 88 Ind. L.J. 1559, 1570 (2013) ("[C]ase law has yet to grapple squarely with current thinking on two-sided markets."). Very few courts have ever even encountered two-sided markets (much less more complicated multi-sided markets). This case is one of the first. *See US Airways*,

2017 WL 1064709, at *10 ("[*Ohio v.*] *Amex* is one of the few cases that explicitly addresses two-sided markets."). In fact, it is the first at the appellate level. *See* USA BIO at 10 ("[N]either this Court nor any other circuit has squarely considered the application of the antitrust laws to two-sided platforms."). And the few cases that waded into these complex issues have had mixed results at best. *See* Evans & Noel, *supra*, at 669 (noting that the few cases that "have touched on two-sided issues" are "not analytically correct").

All of this counsels in favor of a cautionary approach. Sorting pro-competitive and anti-competitive behavior is hard enough in the typical antitrust case. The novelty and complexity of multi-sided markets makes the task all the more difficult. *See* Devlin & Jacobs, *supra*, at 83.

A careful approach is especially appropriate here. As both lower courts acknowledged, the credit-card industry is a critical component of commerce in the United States in that credit cards have become "a principal means by which consumers in the United States purchase goods and services from the nation's millions of merchants." Pet. App. 73a-74a; *Id.* at 5a ("[T]he credit-card industry has generated untold efficiencies to travel, retail sales, and the purchase of goods and services by millions of United States consumers."). Given that credit card transactions are responsible for trillions of dollars in economic activity each year, Pet. App. 52a, the district court thus was right to be wary in deciding this case, Pet. App. 68a ("The court does not come to its decision in this case eagerly or easily."). Even after a seven-week trial in an industry more developed than many other multi-sided platforms, that court struggled with its decision. Recognizing that it "does not possess the experience or expertise necessary

to advise, much less dictate to, the firms in this industry how they must conduct their affairs as going concerns," the court "repeatedly urged the parties in this case to negotiate a mutually agreeable settlement," only reluctantly deciding the case after "the parties having failed to do so." Pet. App. 69a; *id.* ("[T]he court is left with no alternative but to discharge its duty by deciding the question before it."). The district court's wariness should be taken as a warning against making any sweeping pronouncements in this case.

And the stakes are much higher now. Because this Court's decisions are binding across the entire country and on every lower court, *see* Frank J. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev 1, 2 (1984) ("A fundamental difficulty facing the court is the incommensurability of the stakes."), any ruling that extends past the conduct and parties before the Court risks restraining or endorsing economic behavior in other industries throughout the nation.

Especially given the recent explosion in the development of multi-sided markets in our modern economy, the Court should proceed carefully here. Multi-sided markets vary wildly with regard to structure, number of interdependent markets, and how those markets interact with each other. And they continue to develop and evolve in different ways. Put simply, they are not susceptible to one-size-fits-all analysis—either in economic theory or in the application of antitrust law. Thus, any broad proclamation on the application of the Sherman Act to multi-sided markets—even if it were correct as applied to the parties before the Court in this case—could cause great harm to these dynamic markets and impair their development for years to come. Accordingly, the Court should decide this case on

as narrow grounds as possible based on the specific facts before it. Broader issues regarding market definition and consumer welfare should be left for further percolation in the courts where they will have the benefit of further developments in economic theory aided by rigorous empirical research. *Cf. GTE Sylvania Inc.*, 433 U.S. 48-49 ("[T]he experience of the past 10 years should be brought to bear on this subject of considerable commercial importance."). And however the Court rules, it should strive to do "as little injury as possible to the interest of the general public." *E.I du Pont De Nemours*, 366 U.S. at 327-28.

CONCLUSION

Amicus curiae respectfully requests that the Court refrain from issuing any broad pronouncements on novel issues of antitrust law in this case and instead decide only the particular dispute between these parties based on the specific facts and circumstances presented here.

Respectfully submitted,

DAVID E. WHEELER
VERIZON COMMUNICATIONS INC.
1320 North Courthouse Road
Arlington, VA 22201
(703) 351-3155

THOMAS R. MCCARTHY
Counsel of Record
BRYAN K. WEIR
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201
(703) 243-9423
tom@consovoymccarthy.com

Counsel for Amicus Curiae

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No. 16-1454

In the Supreme Court of the United States

STATE OF OHIO, *et al.*,

Petitioners,

v.

AMERICAN EXPRESS CO., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF WAL-MART STORES, INC., THE HOME DEPOT, INC., TARGET CORPORATION, SEARS HOLDING MANAGEMENT CORPORATION, JO-ANN STORES, LLC, AND MERCHANT TRADE ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Deborah White
RETAIL LITIGATION CENTER, INC. and RETAIL INDUSTRY LEADERS ASSOCIATION
1700 N. Moore Street
Arlington, VA 22209

Mark T. Stancil
Counsel of Record
Matthew M. Madden
D. Hunter Smith
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W., Ste. 411-L
Washington, D.C. 20006
(202) 775-4500
mstancil@robbinsrussell.com
Counsel for Retail Litigation Center, Inc., and National Association of Convenience Stores

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

Stephanie Martz
NATIONAL RETAIL FEDERATION
1101 New York Ave, N.W.
Washington, D.C. 20005

Alden L. Atkins
John P. Elwood
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW
Suite 500 West
Washington, D.C. 20037

Counsel for National Retail Federation

Stephanie K. Barnes
FOOD MARKETING INSTITUTE
2345 Crystal Drive,
Ste. 800
Arlington, VA 22202

Christopher Jones
NATIONAL GROCERS ASSOCIATION
1005 N. Glebe Road, Ste. 250
Arlington, VA 22201

William L. Taylor
TAYLOR & POWELL, PLLC
1455 Pennsylvania Avenue,
NW, Ste. 400
Washington, D.C. 20004
Counsel for National Association of Shell Marketers, Inc.

Tim Cheatham
WAL-MART STORES, INC.
702 S.W. 8th Street
Bentonville, AR 72716

David Steele
THE HOME DEPOT, INC.
2455 Paces Ferry Road NW
Atlanta, GA 30339

Robin L. Preble
TARGET CORPORATION
1000 Nicollet Mall
Minneapolis, MN 55403

Stephen L. Sitley
SEARS HOLDINGS MANAGEMENT CORPORATION
3333 Beverly Road
Hoffman Estates, IL 60179

David B. Goldston
JO-ANN STORES, LLC
5555 Darrow Road
Hudson, OH 44236

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INTEREST OF *AMICI CURIAE*[1]

The merchant and trade association *amici* are or represent national and regional retailers. Retail contributed $2.6 trillion to annual GDP, and is a daily barometer for the nation's economy. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs—42 million working Americans.

Amici Wal-Mart Stores, Inc., The Home Depot, Inc., Target Corporation, Sears Holding Management Corporation, and Jo-Ann Stores, LLC represent a diverse assortment of the country's largest retailers, ranging from those offering a wide range of merchandise across all categories, to others that operate in a single large retail vertical, and still others that cater to specific consumer needs. All are dedicated to providing superior products and service to clients at affordable prices. *Amici*'s customers pay for goods and services using various payment methods, including credit cards, so *amici* pay millions of dollars in fees each year to Amex and the other major credit card networks.

The Retail Litigation Center, Inc. (RLC) engages in significant legal proceedings that have a national impact on the retail industry on behalf of its 23 members who are some of the country's largest and most innovative retailers that collectively employ

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, other than *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. All parties have filed blanket consents to the filing of *amicus* briefs.

millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. RLC's members include retailers across all retail verticals from Apple to Walmart, 7-Eleven to Whole Foods, Best Buy, PetSmart, AutoZone, REI, and many more.

The National Retail Federation (NRF) is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers from the United States and more than 45 countries.

The National Association of Convenience Stores (NACS) is an international trade association that represents both the convenience and fuel retailing industries, with more than 2,200 retail and 1,800 supplier company members. The United States convenience industry has more than 154,000 stores across the country and had nearly $550 billion in sales in 2016.

The Food Marketing Institute (FMI) proudly advocates on behalf of the food retail industry, which employs nearly 5 million workers and represents a combined annual sales volume of almost $800 billion. FMI membership includes the entire spectrum of food retail venues; single owner grocery stores, large multi-store supermarket chains, and online and mixed retail stores, with FMI member companies operating nearly 33,000 retail food stores and 12,000 pharmacies.

The National Grocers Association (NGA) is the national trade association representing the retail and wholesale grocers that comprise the independent sector of the food distribution industry. Independent retailers are privately owned or controlled food retail companies operating a variety of formats and this sector is responsible for generating $131 billion in sales, 944,000 jobs, $30 billion in wages, and $27 billion in taxes.

The National Association of Shell Marketers, Inc. (NASM) is a national trade association representing approximately 140 wholesale distributors of Shell-branded petroleum products, together with 65 suppliers of goods and services to the petroleum industry. NASM's members, and the service station dealers supplied by them, engage in credit card transactions involving the sale of convenience store merchandise and Shell-branded motor fuels to consumers at thousands of retail locations throughout the United States.

The Retail Industry Leaders Association (RILA) is a public policy organization consisting of the country's largest retailers. Together RILA's members account for more than $1.5 trillion in annual sales, provide millions of jobs and operate more than 100,000 stores, manufacturing facilities, and distribution centers.

INTRODUCTION

American Express ("Amex") prohibits merchants from truthfully telling their customers that Amex is a higher-fee credit card or giving their customers any incentive to pay with lower-fee cards. After a seven-week trial, the district court found that these

prohibitions—Amex's so-called Non-Discrimination Provisions (NDPs)—actually restrain competition among card networks, cause merchants to pay them higher fees, and lead to increased prices for all consumers (whether they pay by card, cash, check, or using government benefits).

That state of affairs is possible only because merchants have no other choice. For all but some of the smallest merchants, accepting Amex cards is a requirement of doing business. Declining to accept Amex, experience has taught, is a customer-losing proposition. Consumers who hold Amex cards regularly insist on paying with them. The simple fact of life is that, if a merchant does not accept Amex, many consumers will shop elsewhere.

That reality gives Amex significant market power, which it uses to dictate the price and terms on which merchants (even the largest and most sophisticated merchants in the country) accept Amex. In particular, Amex asserts its market power to prevent accurate price information being provided to consumers—which enables Amex to charge supra-competitive merchant fees.

Assume, for example, that a customer at the cash register holds both an Amex card that would give Amex a 3% cut of the impending purchase, as well as Amex's competitor's card that would cost the merchant only half as much. Amex's NDPs strictly prohibit the merchant from providing *truthful information* to that customer about the relative costs of the cards so that the customer can make an informed decision about which card to use. Nor can the merchant offer its customers discounts or other benefits for opting to use the lower-fee card. Amex's

NDPs prohibit the merchant from giving its customers truthful information on the costs of payment choices and from giving customers incentives to use a lower cost option. Amex's NDPs also remove any incentive for competing card issuers to reduce their merchant fees, since they will receive no benefit from doing so.

As a result, Amex and its competitors are able consistently to increase their prices unencumbered by market pressure to keep prices down. The merchant's customer (assuming she is affluent enough to qualify for an Amex card), in turn, focuses solely on whatever "rewards" she might get for using an Amex card—unaware of the resulting cost to the merchant and, ultimately, to the customers themselves. Having thus prevented price signaling at the cash register, Amex then exploits the disconnect by bombarding the consumer with signals about the benefits of using its card. Armed with incomplete information, the consumer inaccurately perceives Amex's rewards to be a free lunch.

The record in this case amply demonstrates that merchants *want* to send accurate price signals to their customers by providing information about credit card costs or incentives for using lower-cost cards. By prohibiting merchants from doing so, Amex's restraint of trade suppresses price competition among credit card networks. As the district court correctly found, Amex "prevent[s] merchants from influencing their customers' payment choices." Pet. App. 202a. By tying merchants' hands in this manner, Amex's NDPs "effectively remove the incentive" for credit card networks "to compete with one another by offering

merchants a lower price." *Id.* at 203a. That elimination of price competition not only protects Amex's high-priced network, but also allows other credit card networks to raise their fees, as Discover did when it realized it could not gain market share with lower prices. Pet. App. 204a–06a. In other words, while Amex's NDP's are imposed by Amex unilaterally, their purpose and effect is to prevent fee competition among Amex, Visa, MasterCard, and Discover—the only four networks.

The undisputed result is that merchants pay higher fees than they would have to in a competitive environment. Indeed, as Kansas City Federal Reserve Bank researchers noted, the fees that U.S. merchants pay to credit card networks are among the highest in the world.[2] Merchants then pass those added expenses on to their customers through higher prices for goods and services. And *all* of a merchant's customers bear that resulting burden—even if they pay by cash, check, or using government benefits such as "food stamps." This is antithetical to all efficient markets, and particularly so in retail and other industries where businesses most aggressively wring out unnecessary costs to provide consumers the lowest-possible prices.

It is also a growing problem. The relentless march toward a cashless economy magnifies the

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[2] Bradford & Hayashi, *Developments in Interchange Fees in the United States and Abroad*, Payment Sys. Research Briefing (Federal Reserve Bank of Kansas City), April 2008, at 1, http://bit.ly/2jiwHMz; see also Hayashi, *Credit and Debit Card Interchange Fees in Various Countries*, August 2016, http://bit.ly/2BXgxgf.

significance of non-cash transactions—and the economic drag from their inefficient and anti-competitive fees. A decreasing number of consumers pay for so little as a cup of coffee by cash or check—and fewer still shop online that way.

Amex nevertheless defends its restraint of interbrand competition among credit card networks as perfectly acceptable under the antitrust laws. It relies on the claimed two-sidedness of the credit card business, in which credit card networks compete for both merchants and cardholders. The merchant and cardholder sides of its business must be thought of as one market, Amex contends. Accordingly, it says, the district court's unchallenged factual findings that Amex has eliminated price competition among credit card networks and caused merchants to pay "dramatically" higher prices prove nothing—not even a *prima facie* case requiring rebuttal. Pet. App. 71a.

The special "two-sidedness" rule that Amex seeks turns antitrust doctrine on its head. Markets, for antitrust purposes, are about substitutes; they comprise things that customers would substitute in response to a price increase. The record in this case amply demonstrates—and the district court correctly found—that merchants can substitute only among the major credit card networks in response to a price increase by any one of them (or all of them). That, accordingly, is the relevant market, and the effect of Amex's elimination of price competition in that market, the district court found, is rising prices without meaningful opportunities for exit. See Pet. App. 150a.

Moreover, it is well-established that courts must evaluate trade restraints' competitive effects on the

goods or services that sellers offer to buyers. Courts properly focus on whether a restraint enhances the competitive process. Claims that third parties to that exchange may benefit from anticompetitive restraints on it are routinely rejected, as are arguments that withholding information from consumers can be justified as pro-competitive. This Court has emphasized that the "Sherman Act reflects a legislative judgment that, ultimately, competition will produce not only lower prices but also better goods and services." *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 695 (1978). Nothing about the nature of Amex's business "platform" requires upending that sound application of settled antitrust doctrine.

* * * * *

This brief details merchants' uniquely relevant perspective on why that must be so in the credit card industry just as it is in every other industry. As explained below, the record here is full of compelling evidence—much of it developed through testimony from merchants about their actual experiences—of Amex's market power and its use of that power to dictate the price and terms on which merchants must accept Amex cards. That evidence cannot be reconciled with the court of appeals' conclusion that Amex's actions may, by the magic of calling its business a two-sided platform, be procompetitive. Or that merchants are not subject to the market power they actually experience every time they deal with Amex. To the contrary, the record shows that even the largest merchants stand no realistic chance in the face of Amex's market power, and that there is

no countervailing procompetitive byproduct to the way Amex exploits this coercive dynamic.

This brief also details how Amex's terms generate supra-competitive merchant fees that are in turn passed on to *all* customers. It explains how that harms even Amex cardholders, who are prevented from having the opportunity to make informed decisions about whether to accept discounts or other alternative "rewards" from merchants for their purchases. Tellingly, Amex wins big, as do the other major card networks (which also enjoy supra-competitive fees thanks to Amex).

Finally, this brief explains how the court of appeals' special rule for credit card network platforms ignores the market realities that merchants face, and demonstrates that traditional antitrust principles are more than up to the task of defining the relevant market and shifting the burden to Amex to demonstrate any procompetitive effects their conduct has elsewhere. Not only is there no reason to ramble through the wilds of economic theory to address a restraint of trade that increases prices, but doing so (as the court of appeals did) risks vesting already powerful companies like Amex (and those that will follow as our economy becomes increasingly electronic) with the power to throttle competition where it is most needed.

ARGUMENT

I. Amex Has Market Power Over Merchants, And Wields That Power To Stifle Competition And Harm Consumers

Some of the largest merchants in the country (including certain merchant *amici*) repeatedly testified at trial to their real-world experience as market participants, and the district court found that testimony to be credible evidence of market power and price distortion. Those factual findings were not challenged on appeal, nor did the court of appeals find them to be clearly erroneous.

Instead, the court of appeals dispatched the evidence presented and the district court's factual findings as misplaced observations about just one facet of a larger platform. It contended, moreover, that the district court "ignore[d]" that *some* merchants *do not* accept Amex, see Pet. App. 46a, and minimized "cardholder insistence" on using Amex cards as being little more than a fancy name for "cardholder satisfaction," *id.* at 48a.

The court of appeals was wrong. Below, we highlight merchant testimony and other record evidence demonstrating (1) Amex's very real market power to dictate fees and other terms to even the largest merchants in the country, which have no practical choice but to accept Amex cards, and (2) the anticompetitive effects its exercise of that power has on all merchants and their customers. These real world facts illustrate the actual harm that Amex's conduct imposes on merchants and, by extension, consumers.

A. Even The Largest U.S. Merchants Have No Choice But To Accept Amex On The Terms That Amex Dictates

Virtually every major, multi-location retailer in America accepts Amex, even though Amex charges them higher fees than Amex's competitors. The court of appeals tried to minimize that fact by pointing out that one-third of merchants who accept credit card payment do not accept Amex. Pet. App. 46a. That is true, but misses the point. By the end of 2016, Amex cards were accepted in locations accounting for *90 percent* of credit card spending in the United States. American Express Company, Form 10-K for year ending Dec. 31, 2016, at 3 (Feb. 17, 2017). The Amex holdouts are "very, very small," in the words of Amex's senior vice president for merchant relations. Pet. App. 224a n.48. Most of them "are 'probably half the size' of 'your local florist.'" *Ibid.*[3]

As a result, customers expect all but a small minority of the smallest merchants to accept any and all cards from the major networks (Visa, MasterCard, and Amex). The district court found that to be true, specifically, for Amex cardholders. Some are required to use Amex cards for business expenses, and others want the airline miles, statement credits, or other benefits that come with card use. Pet. App.

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[3] Even among this group of small merchants, Amex acceptance may be increasing. The district court found that much of Amex's coverage gap results from its historical choice not to *pursue* small merchants for its network. Pet. App. 186a–87a. But Amex recently has begun to seek out this additional merchant base. *Id.* at 187a–88a; see also *id.* at 89a (discussing Amex's "Small Business Saturday" and other initiatives "to promote spending at small businesses").

157a–58a. The resulting cardholder insistence has long safeguarded Amex's position in the industry. Such cardholder insistence is becoming all the more a factor as commerce increasingly moves online. These days, a customer who encounters a merchant that does not accept Amex can choose to purchase the same goods from one that will, all without leaving the couch.

Not surprisingly, then, medium and large merchants have just about universally concluded that refusing to accept Amex is not a commercially viable option. In other antitrust cases, unsuccessful customer attempts to exit in response to exercises of market power must be hypothesized or assumed, but in this case there is concrete record evidence that Amex is able "to force [merchants] to do something that [they] would not do in a competitive market." *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 464 (1992).

An overcharged merchant can dream, of course, but most quickly awaken to this market reality. At trial, witnesses from Ikea, Best Buy, Enterprise, and Sprint all testified that their respective companies conducted analyses, surveys, and "war game[s]" regarding the feasibility of declining Amex. Pet. App. 159a n.27. Each concluded that "the foregone profits associated with losing Amex-insistent customers"—customers who will shop elsewhere if they are unable to use Amex—"rendered dropping Amex commercially impractical." *Id.* at 159a.

Hilton Hotels, for example, predicted that if it dropped Amex it would lose *two-thirds* of its Amex charge volume. Pet. App. 158a–59a n.26. Witnesses from Sears, Crate & Barrel, and The Home Depot

testified that their companies determined they did not need a detailed study to know that refusing to accept Amex was nonsensical. *Ibid.* As one merchant testified, dropping Amex would be "crazy." *Ibid.*

Two major merchants put that wisdom to the test. As briefly explained below, their experience confirmed what their counterparts predicted: Amex acceptance is effectively mandatory for all but a small percentage of the smallest merchants. Before long, the "rogue" merchants were back in the Amex fold—and on Amex's terms.

Walgreens stopped accepting Amex cards in 2004 after Amex raised its merchant fee by ten basis points (notwithstanding that the fee was already forty basis points higher than Visa's or MasterCard's). Pet. App. 163a. At the time, Walgreens was the ninth largest retailer in the United States. But that size could not carry the day against Amex. In the end, Walgreens "was forced to retreat" from its decision "in the face of public outcry from its customers." *Ibid.* Walgreens ended up "capitulat[ing]" to Amex and accepting "pricing terms that were substantially similar to those [it] had previously deemed unacceptable." *Ibid.*

Murphy Oil likewise stopped accepting Amex in 2008, at which point it operated roughly a thousand gas stations and convenience stores in Walmart parking lots across the country. Murphy Oil ended up losing *twice* the number of customers that even Amex had predicted it would. Pet. App. 162a. That substantial wave of customer attrition forced Murphy Oil to resume accepting Amex—yet again, on Amex's terms. *Id.* at 163a. The head of Amex's pricing unit wrote to colleagues that Amex "should

be able to make use" of the Murphy Oil example during "merchant negotiations." *Ibid.*

The lack of realistic exit ramps for merchants, the district court concluded, has put Amex in the driver's seat. The district court found, after extensive analysis (see, *e.g.*, Pet. App. 166a–72a), that "American Express's ability to impose significant price increases during its Value Recapture initiatives between 2005 and 2010 without any meaningful merchant attrition is *compelling evidence* of Defendants' power in the network service market." *Id.* at 150a (emphasis added). The NDPs ensured that competition from other credit cards did not constrain Amex's ability to raise prices.

At trial, however, Amex tried to insist that it can't be *that* powerful given that *some* merchants got out from under its standard NDPs. But its own evidence proved the opposite. It could find only 139 merchants—***out of the over 3 million in its network***—who had received even marginal variations on the NDPs in negotiations with Amex. Pet. App. 97a. And, as the district court found, those variations did not open a pathway to meaningful competition among card networks: "[T]he [non-standard] rules still restrict[ed] nearly all forms of point-of-sale steering, including merchants' ability to express a preference for a particular card brand." *Ibid.*

Such widespread merchant acquiescence in Amex's standard anti-steering rules is not for want of pushback. "[M]any * * * larger merchants have requested that Amex remove its NDPs from their agreements entirely." Pet. App. 97a. Representatives from merchants as ubiquitous as The Home Depot,

Hilton, and Sprint established at trial that they took their best shot at getting anti-steering rules removed from their respective Amex agreements. See *id.* at 97a–98a. None succeeded. See *ibid.* Amex's ability to impose these restraints on unwilling merchant after unwilling merchant is a testament to what the district court correctly recognized as Amex's "significant power" over merchants large and small. *Id.* at 159a.[4]

B. The Anti-Steering Rules Amex Imposes On Merchants Have Actual and Substantial Anticompetitive Effects

The rule of reason prohibits restraints of trade that have unjustified anticompetitive effects. *Chi. Bd. of Trade* v. *United States*, 246 U.S. 231, 238 (1918); Pet. App. 108a–09a. To establish a *prima facie* case, a plaintiff may prove such effects directly. *Ibid.* When the anticompetitive effects are obvious,

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[4] Amex's NDPs sustain the market power that allows Amex to impose them in the first place. Amex cardholders—shielded by the NDPs from truthful information about the cost to merchants of Amex card use—make the economically rational choice to insist on using Amex. The cardholder gets rewards and benefits from Amex for doing so, while paying the same retail price as everyone else. Amex's vicious cycle of market-power maintenance—on the backs of merchants and their customers—has been extraordinarily successful. The court of appeals incorrectly concluded, however, that Amex's investment in its rent-seeking activity—through the cardholder rewards that drive the customer insistence that gives it market power—somehow *disproves* that Amex has that market power. See Pet. App. 46a. Not so. Rather, this is the textbook behavior of a rent-seeking firm engaging in (and trying to safeguard) anticompetitive conduct. See, *e.g.*, Baumol & Blinder, *Economics: Principles and Policy* 381 (13th ed. 2015).

or there is a "naked restraint" on price or output, the Rule of Reason can "be applied in the twinkling of an eye." *NCAA* v. *Bd. of Regents*, 468 U.S. 85, 109–10 & n.39 (1984). Alternatively, if the plaintiff shows that a defendant has market power, it is enough to show that the restraint has potential anticompetitive effects. Pet. App. 108a–09a. Amex's NDPs were shown to be anticompetitive under both methods.

1. Plaintiffs demonstrated the anticompetitive effects of Amex's NDPs directly. Not surprisingly, the record showed (and the district court found) that everyone—except Amex and the other major payment card networks—loses from the market failure caused by Amex's NDPs.

a. The district court found ample direct evidence of anticompetitive effects, and those findings are not challenged. Merchants are "[d]eprived of any meaningful ability to regulate their own consumption of network services in response to differences in network pricing." Pet. App. 196a. The result—indeed, Amex's *intended* result—is that merchants pay "dramatically" higher prices to all four card networks for services than they would but for the rules. *Id.* at 71a. Indeed, U.S. merchants pay among the highest fees to credit card networks in the world. See *supra* p. 6 & n.2.

The NDPs prohibit merchants that accept Amex from engaging in practices that would encourage competition among credit card networks over the price that merchants must pay for their services. Among other things, the anti-steering rules prevent merchants from:

- giving consumers truthful information about the relative costs of their cards;
- indicating or implying, directly or indirectly, that they prefer any other payment products over Amex;
- giving consumers any inducements, such as loyalty points or discounts, for using a different card;
- imposing any restrictions, conditions, disadvantages, or fees that are not imposed equally on all other payment products (except for electronic funds transfer, cash, or check);
- promoting any other payment product (except the merchant's own private-label card that it issues for use solely at the merchant's establishment) more actively than it promotes Amex.

See Pet. App. 95a–96a.

Those provisions constrain interbrand competition not only *with Amex*, but among *all* the card networks. Pet. App. 100a–01a. That is, a merchant that accepts Amex is barred from communicating a preference even between *non-Amex* credit cards. And that remains true notwithstanding that Visa and MasterCard each ceased enforcing *their own* prohibitions against discounting as a result of this litigation.

In the absence of Amex's NDPs, credit card networks would have an incentive to compete on price. Indeed, the district court found that the NDPs' genesis lay in putting an end to such competition. Starting in the late 1980s, for example, Visa

launched a "We Prefer Visa" campaign to encourage competition and consumer preference for its cards. Pet. App. 92a. During the late 1990s, moreover, Discover spotted an opportunity to gain market share from competing card networks amidst "merchant dissatisfaction" over those networks' fee increases. Pet. App. 204a. Discover intended to "partner with merchants in helping them control payment costs and proposed that they steer customers to the lower-cost Discover cards." *Ibid.* "Discover representatives * * * met with a number of larger merchants to offer discounts from the network's already lower prices if they would steer customers to Discover." *Ibid.*

But Amex would have none of it. It "tightened" its NDPs to nip such competition in the bud. Visa could no longer sustain a campaign built on merchant preference for its cards. And Discover's efforts at price competition "failed to produce any significant movement in [market] share due to the anti-steering rules" that Amex and the other dominant networks (Visa and MasterCard) maintained at the time. Pet. App. 205a (internal quotation marks omitted). Discover was forced to abandon its low-cost strategy and, predictably, then raised its merchant fees. *Id.* at 206a. Discover's CEO testified at trial that, as a result of the anti-steering rules, "offering a lower price was not going to give Discover any business benefits." *Ibid.* (alteration marks omitted). Lowering prices in the absence of meaningful competition was just "leaving money on the table." *Ibid.* The district court correctly found that "the failure of Discover's low-price value proposition" to merchants "is emblematic of the harm

done to the competitive process by Amex's rules against merchant steering." *Ibid.*

The district court also found that Amex's NDPs "are responsible for inhibiting the development of several proposed merchant-owned payment solutions." Pet. App. 213a. For example, an effort by forty large retailers to develop a new, lower-cost payment platform ran into hurdles established by the restrictions on merchant steering. *Ibid.* By thus "impeding development of novel payment solutions," the NDPs prevent the "diversification" of the network services industry, which would also "improve the quality of offerings therein." *Id.* at 214a.

b. Consumers who do not use Amex are directly harmed by Amex's supra-competitive fees. The "merchant discount fees" that card networks charge on every credit card transaction are a substantial business expense for almost all merchants. Merchants, like *amici*, testified that they each pay hundreds of millions of dollars each year in credit card fees. In 2013, the four major card networks handled nearly $2.4 trillion in credit and charge card spending for merchants. Pet. App. 74a. And all indications are that the volume of credit card activity has been increasing ever since. See Nilson Report Issue 1103 (Feb. 2017), http://bit.ly/2zUVF8V. Those fees, like other costs of merchant operations, ultimately are imposed on consumers through higher prices, reduced service, or other measures.

All consumers, no matter their method of payment, end up paying the higher prices that result from anticompetitive credit card fees. The district court found that non-Amex cardholders are thus

forced to "subsidiz[e] * * * the cost of the premium rewards conferred by American Express." Pet. App. 212a. That forced subsidy—from all of a merchant's customers to a mere subset of them—is not only economically inefficient, but also "highly regressive." *Ibid.* Amex has a "relatively small, affluent cardholder base." *Ibid.* But *everyone* pays higher retail prices to fund Amex cardholders' benefits.

c. Amex cardholders are harmed as well. The anti-steering rules deprive each Amex cardholder of the "chance to decide whether he or she wants to get the rewards for [a] given purchase from the card issuer or whether he or she would rather get some sort of reward from the merchant." Pet. App. 220a (ellipses omitted). For example, some merchants testified that they would offer incentives, such as rewards points, to customers using less expensive cards. Consumers may very well prefer merchant rewards, but the NDPs deny Amex cardholders that choice (and make their "choice" to get Amex rewards or to get nothing). Such a "restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with th[e] fundamental goal of antitrust law." *NCAA*, 468 U.S. at 107.

d. The big winner in all of this is, of course, Amex (along with the other credit card networks it has freed from the inconvenience of competition). The district court found that, by preventing any steering among card networks, Amex has "blocked an important safety valve that would have moderated its efforts to increase discount rates [*i.e.*, prices]." Pet. App. 208a. The anti-steering rules have thus "aided the network's efforts to profitably raise its

discount rates on merchants." *Ibid.* Merchants have been dissatisfied with these fee increases, but (like most victims of anticompetitive conduct) they have had no choice but to accept them. Tellingly, Amex did not lose a *single* large merchant, and only a tiny handful of medium ones, as a result of its dozen or so significant fee increases between 2005 and 2010. *Id.* at 165a–72a.

Amex has complained that its "current business model" would collapse if exposed to "interbrand competition." Pet. App. 235a. The antitrust laws were enacted for "the protection of competition," however, "not competitors" and their preferred business models. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962). In any event, the district court found that Amex would adapt "to suit a market in which it is required to compete" for both merchants and cardholders. Pet. App. 244a. Amex's unwillingness to do so is no defense.

It is no surprise, either. The merchant fee increases that the NDPs have made possible have been extraordinarily high and incredibly profitable. For example, Amex's rate increases just between 2006 and 2010 "resulted in $1.3 billion in incremental pre-tax income" for Amex. Pet. App. 170a. Those fee hikes, the district court found, were "not paired with offsetting adjustments on the cardholder side of the platform," and, as a result, "are properly viewed as changes to the net price charged across Amex's integrated platform." *Id.* at 166a–67a; see also *id.* at 209a (finding that Amex's price increases resulted in a "higher net price"). The district court approvingly credited the government's economist's observation "that American Express

spends *less than half* of the discount fees it collects from merchants on cardholder rewards." *Id.* at 209a–10a (emphasis added). Those findings are not challenged on appeal or clearly erroneous. The Second Circuit likewise acknowledged that the "evidence on the record suggests—and Amex conceded at oral argument—that not all of Amex's gains from increased merchant fees are passed along to cardholders in the form of rewards." *Id.* at 51a. Much of the premium Amex charges merchants, in the candid words of its CFO, gets "drop[ped]" into profit on Amex's "bottom line." *Id.* at 209a.

2. Plaintiffs also established their *prima facie* case by the indirect method. Amex's significant market power means that the price distortion caused by its NDPs is likely to have anticompetitive effects. Price distortions like those enforced by the NDPs cause market failures. When actors do not bear the full costs of an activity, they will engage in that activity more often than is socially desirable. See, *e.g.*, Baumol & Blinder, *Economics: Principles and Policy* 305–06 (13th ed. 2015). Such distortions "impair[] the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them." *FTC* v. *Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986). For that reason, "[a]bsent some countervailing procompetitive virtue," restraints that distort prices "cannot be sustained under the Rule of Reason." *Ibid.*; accord *NCAA*, 468 U.S. at 107.

Accordingly, even if (counterfactually) the district court had not found *actual* anticompetitive effects of Amex's conduct, there could hardly be

clearer evidence of the *potential* for those effects than Amex's elimination of any "incentive for [Amex] or its network competitors to compete with one another by offering merchants a lower price," and suppression of a "critical form of horizontal, interbrand competition." Pet. App. 203a. Price is "the central nervous system of the economy," *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940), and neither Amex nor the Second Circuit has cited any case in which a restraint with the purpose and effect of preventing firms from inducing horizontal price competition has passed muster, let alone sailed to support a *prima facie* case of violation.

II. The Second Circuit's Special Rule For Two-Sided Platforms Condones Anticompetitive Conduct In What Traditional Antitrust Principles Recognize As A Separate Market

After a seven-week trial, the district court found that Amex's restraint of trade caused price distortions that prevented competition, "dramatically" raised prices for merchants and consumers, erected barriers to market entry, and stifled innovation. Pet. App. 71a, 203a, 210a–11a, 214a. As a result, the burden was properly on Amex to demonstrate that its conduct nevertheless has offsetting procompetitive effects that made it reasonable. See *Cal. Dental Ass'n* v. *FTC*, 526 U.S. 756, 775 n.12 (1999); *FTC* v. *Actavis, Inc.*, 133 S. Ct. 2223, 2236 (2013). The district court found that Amex failed to make such a showing; in fact, the court found that the evidence demonstrated that the asserted benefits to cardholders did not offset the anticompetitive effects on merchants and their customers.

The court of appeals, however, crafted a special rule for credit card platforms that ignores how the market actually operates for merchants. By focusing on the interdependency of prices charged on both sides of the platform, it abandoned the traditional approach to market definition grounded in the interchangeability of products and services. After thus expanding the relevant market to encompass the entirety of Amex's "platform," the court faulted plaintiffs for not *disproving* the possibility that Amex giveth to cardholders every penny it taketh away from merchants and their customers.

We detail below the absurdity of that special rule—an observation that is best isolated by looking at the market-definition question from the merchants' vantage point. Prices in *all* markets depend to some degree on prices in other markets. The real question when setting out to determine the relevant market in which a firm may have power is whether other services are available to merchants to substitute for credit card acceptance if (as Amex does here) the card network charges supra-competitive fees. The district court correctly concluded that there is no substitute, thereby properly defining the appropriate market (and explaining why merchant fees have stayed so high for so long).

Analyzing the potential substitutes that merchants might have for credit card acceptance is how courts have defined and should define a market such as this, and nothing about two-sided platforms merits a new and different approach. If Amex's restraint of competition among card networks for merchants' sales has pro-competitive effects in some

other part of its business, then the burden was on Amex to prove it.

A. Economic Activity On Each Side Of A Two-Sided Platform Should Not Be Collapsed Into One "Market" For Antitrust Purposes

1. The Second Circuit erred in treating different markets connected by a platform as a single market for antitrust purposes. Ignoring the district court's factual finding that merchants and cardholders are in different markets, the Second Circuit determined that, as a matter of law, the relevant market had to encompass both merchants *and* cardholders because they are "equally important and interdependent sets of consumers" and that the price charged each group affects "the optimal level" of price to charge the other. Pet. App. 50a. A common-sense application of the antitrust laws, and decades of settled doctrine, establish otherwise.

This Court has long held that a "market is composed of products that have reasonable interchangeability for the purposes for which they are produced." *Int'l Boxing Club of N.Y., Inc.* v. *United States*, 358 U.S. 242, 250 (1959). The reason, other courts have explained, is that it is "the ability of consumers to turn to other suppliers [that] restrains a firm from raising prices above the competitive level." *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986) (Bork, J.).

The question, then, is to what substitute can a merchant turn if Amex raises its price above a competitive level. There is no dispute that they could

turn to other credit card networks (Visa, MasterCard, and Discover). So those networks undoubtedly provide services to merchants in the same market as Amex.[5]

But how could the services that Amex provides to its cardholders be a substitute for the services it provides to merchants? A merchant facing a fee increase from Amex cannot swap out its acceptance of Amex cards for the services Amex provides to "Mary Johnson, cardholder since 1998." Even if the *prices* that Amex charges users on each side of its platform are *interdependent*—and that has not been established—the *services* are not *interchangeable*.

That is the lesson of this Court's holding in *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 (1953). That decision recognized that newspapers are "dual trader[s] in separate though interdependent markets." *Id.* at 610. They sell "the paper's news and advertising content to its readers; in effect that readership is in turn sold to the buyers of advertising space." *Ibid.* But this Court recognized that the case before it "concern[ed] solely one of these markets," and had no qualms about analyzing defendants' market position solely by reference to its "dominance in the advertising market, not in readership." *Ibid.* The mere fact that prices in the two connected markets were "interdependent" did not collapse them into a single market. *Ibid.*

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[5] The district court evaluated whether debit cards could substitute for credit cards and thereby "temper an exercise of market power" by credit card networks, and found they could not. Pet. App. 124a.

The "indisputable proposition[]" that substitutability is what tempers market power explains why courts, the Department of Justice, and the Federal Trade Commission have long employed the so-called "hypothetical monopolist test" to define markets. See 2B Areeda & Hovenkamp, *Antitrust Law* ¶ 536, at 302 (4th ed. 2014). Under that test, if a hypothetical monopolist could impose "a small, but significant non-transitory increase in price ('SSNIP')" in a proposed market "without losing so many sales to other products as to render the SSNIP unprofitable, then the proposed market is the relevant market." Pet. App. 37a. Amex's successful implementation of its Value Recapture campaign *demonstrates*—and not at all hypothetically—that it has and does profitably impose price increases on merchants without losing enough business to render the move unprofitable. The services that credit card networks provide cardholders did not constrain Amex's ability to significantly raise prices on merchants, demonstrating that Amex's different services are provided in different markets.

Also unavailing is Amex's "one product, one market" argument. In Amex's view, it produces "credit card transactions" paid for by both merchants and cardholders. Amex indisputably faces two different groups of consumers that ask it for different things, and pay different prices in different ways for those things. The fact that Amex's business consists of pairing two distinct sets of customer groups does not require collapsing the distinct markets in which Amex operates.

2. The developing economics literature on two-sided and multi-sided "markets" does not displace

this Court's approach to market definition and the principles underlying it. Indeed, some of that literature is careful to acknowledge that it uses "[t]he term 'market' * * * loosely" and not "how that term is often used in antitrust." Evans & Schmalensee, *Markets With Two-Sided Platforms*, 1 Issues in Competition L. & Pol'y 667, 668 (2008). Nothing about a platform's "two-sidedness" undermines why this Court has looked to the interchangeability of goods and services to define antitrust markets. It is the ability to substitute that tempers any monopolist's attempt to exercise market power. See *Int'l Boxing Club*, 358 U.S. at 250; *Rothery Storage*, 792 F.2d at 218.

What is more, economists do not agree on what two-sidedness actually entails. See Hagiu & Wright, *Multi-Sided Platforms*, 43 Int'l J. Indus. Org. 162, 163 (2015) ("[T]here is disagreement among those in the literature about what constitutes an appropriate definition."). Definitions of a two-sided platform advanced by authorities in the field include:

- An intermediary that "can affect the volume of transactions by charging more to one side of the [platform] and reducing the price paid by the other side by an equal amount." Rochet & Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. Econ. 645, 664–65 (2006).
- An intermediary that serves "two or more groups of customers"; "who need each other"; "who cannot capture the value from their mutual attraction"; and "rely on [a] catalyst to facilitate value-creating interactions." Evans & Schmalensee, *The Antitrust Analysis of Multisided Platform Businesses*, *in* 1 *The Oxford*

Handbook of International Antitrust Economics 404, 409 (Blair & Sokol eds., 2014).

- A platform that, in addition to "other requirements," "enable[s] direct interactions" between two sides that must be "affiliated with the platform." Hagiu & Wright, *supra*, at 163.

A recent article "document[ing] serious conceptual divergences" in the literature on two-sided markets includes an appendix comparing how different prominent definitions of the concept affect which industries count as two-sided—with markedly divergent results. See Auer & Petit, *Two-Sided Markets and the Challenge of Turning Economic Theory into Antitrust Policy*, 60 Antitrust Bul. 426, 427, 458–61 (2015).

Indeed, under a sufficiently broad concept of "two-sidedness" a court could find it to "exist in practically all markets." Rysman, *The Economics of Two-Sided Markets*, 23 J. Econ. Perspectives 125, 127 (2009). For example, "the market for autos could be viewed as two-sided because manufacturers must attract both consumers and mechanic expertise." *Ibid.*

Or take retailers: it could even be said that "a conventional retailer" operates a two-sided platform under broad-enough definitions of the term. Carlton & Winter, *Vertical MFN's and the Credit Card No-surcharge Rule*, at 39 (June 6, 2017), http://bit.ly/2mcYNKa. After all, retailers facilitate interaction between manufacturers and end consumers. Neither manufacturers nor end consumers would transact with retailers if the other group did not do so. Manufacturers, moreover, can be

said to pay a "negative price" to the retail "platform" for the service of bringing customers to their wares, while customers pay the bulk of the "net price." And yet few people would say that retailers sell "transactions in goods" at a "net price" to manufacturers and end users. Rather, retailers effectively provide shelf space to manufacturers and sell goods to customers in two separate but interdependent markets.

The same thought experiment can be run on just about *any* market that involves pairing inputs from two or more distinct groups. Sorting out which industries must be treated as multi-sided platforms meriting a special rule and which are subject to traditional antitrust principles would be as complicated as it is unwarranted. The parties do not agree, for example, on whether newspapers or the NCAA constitute multi-sided platforms. Compare Pet. 21–23, with Amex Opp. 18–19.

Courts should not be required to resolve such esoteric questions to resolve otherwise straightforward antitrust cases. Judges faced, as here, with clear evidence of anticompetitive conduct and effect need not "ramble through the wilds of economic theory" to decide whether plaintiffs have made out a *prima facie* case. *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 609 n.10 (1972).

B. Amex Did Not Carry Its Burden To Demonstrate Any Procompetitive Effects Of Its NDPs

1. In whatever way the market is defined here, once plaintiffs demonstrated the anticompetitive effects of Amex's NDPs—higher merchant fees,

higher prices for goods and services, etc.—the burden shifted to Amex to demonstrate that its restraint of trade had offsetting procompetitive effects. The district court correctly found that Amex could not carry that burden.[6]

That is how burden-shifting works under the traditional rule-of-reason analysis. "Once the plaintiff satisfies its initial burden to prove anticompetitive effects, the burden shifts to the defendant to offer evidence of any procompetitive effects of the restraint at issue." Pet. App. 28a. The courts of appeals all apply a version of this framework,[7] and this Court has found no cause to disturb it. See, *e.g.*, *Cal. Dental Ass'n.*, 526 U.S. at 775 n.12; *Actavis*, 133 S. Ct. at 2236. Here, Amex proposed two procompetitive justifications for its conduct, but the district court found that neither "offset * * * the more widespread and injurious

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[6] More than that, the district court found that the evidence pointed *in the opposite direction*. Amex's unsuccessful attempt to provide a procompetitive justification for restricting interbrand competition only "highlight[ed]" that "Amex's current business model could not survive if exposed to the full spectrum of interbrand competition." Pet. App. 235a. That is, Amex's model depends on the anticompetitive effects it has baked into the market via its NDPs.

[7] See, *e.g.*, *Suture Express, Inc.* v. *Owens & Minor Distribution, Inc.*, 851 F.3d 1029, 1038 (10th Cir. 2017); *O'Bannon* v. *NCAA*, 802 F.3d 1049, 1070 (9th Cir. 2015); *King Drug Co. of Florence* v. *Smithkline Beecham Corp.*, 791 F.3d 388, 412 (3d Cir. 2015); *Schering-Plough Corp.* v. *FTC*, 402 F.3d 1056, 1065 (11th Cir. 2005); *Craftsmen Limousine, Inc.* v. *Ford Motor Co.*, 491 F.3d 380, 389 (8th Cir. 2007); *Nat'l Hockey League Players' Ass'n* v. *Plymouth Whalers Hockey Club*, 325 F.3d 712, 718 (6th Cir. 2003).

effects of the NDPs on interbrand competition in the relevant market." Pet. App. 229a.

The court of appeals did not dispute the district court's factual findings on the NDPs' various anticompetitive effects on merchants and consumers. But instead of leaving the burden to Amex (where it belongs), the court concluded that *plaintiffs* needed to *disprove* that any procompetitive effects on the cardholder side of Amex's business outweighed the anticompetitive effects on the merchant side.

That is wrong. For starters, the court of appeals' rationale runs counter to the basic precept that competition "cannot be foreclosed with respect to one sector of the economy because * * * such foreclosure might promote greater competition in a more important sector of the economy." *Topco Assocs.*, 405 U.S. at 610. But even if it *could* be welfare-maximizing to restrain competition in one market for the benefit of competition in another, "courts are ill-equipped and ill-situated for such decisionmaking." *Id.* at 611; see also *United States* v. *Phila. Nat'l Bank*, 374 U.S. 321, 370 (1963) (rejecting that "anticompetitive effects in one market could be justified by procompetitive consequences in another"). How is a court supposed to determine the number of airline miles awarded to cardholders that justify higher fees to merchants (and higher prices to all their customers)? Such an apples-to-oranges comparison across different "sides" of a business "platform" is "beyond the ordinary limits of judicial competence." *Id.* at 371. Even Amex could not articulate a way to calculate a net price across both sides of the platform. Pet. App. 182a–86a, 209a.

So while Amex may prefer to restrict competition on the merchant side of its platform in order to manufacture resources with which to compete for cardholders, that is not a choice it gets to make. "[U]nder antitrust policy *competition* should choose the optimal mix of revenue as between the two sides." Areeda & Hovenkamp ¶ 562e, at 101 (Supp. 2017); see also *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695 ("The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.").

Even if Amex could conceivably justify the anticompetitive effects of its conduct on merchants and consumers by pointing to the rewards and other benefits it offers cardholders, there is every reason to put the onus on Amex to do so. Burdens are "traditionally * * * placed on the party having the readier access to knowledge about the fact in question." James et al., *Civil Procedure* 421 (5th ed. 2001). Such information-forcing rules improve decisionmaking by "provid[ing] an incentive for the party with the best access to private information to disclose it." Reinert, *Pleading as Information-Forcing*, 75 L. & Contemp. Prob. 1, 29 (2012).

Amex has designed and operates a business with two distinct groups of customers, and with complicated pricing structures on each side. "The defendant, being the author of the restraints, is in a better position to explain why they are profitable and in consumers' best interests." Areeda & Hovenkamp ¶ 1507, at 171 (Supp. 2017). By enacting a special rule for two-sided platforms, the decision below

unwisely departs from that long-settled, common-sense approach.

III. Reversal Will Encourage Competition And Enhance Consumer Welfare

The decision below should be reversed. Amex did not challenge the district court's findings of fact, but rather asserted that those findings were legally insufficient to sustain Plaintiffs' *prima facie* Section 1 case. See Amex C.A. Br. 37–83. But they are enough, and that should end the matter. Merchants and their customers eagerly await their long-incoming relief from Amex's anticompetitive conduct.

Reversing the decision below will, in addition to respecting settled antitrust principles, yield significant pro-competitive results for consumers nationwide. Amex's conduct fundamentally distorts the competitive process. On the merchant side, Amex has prevented other card networks from competing on price. On the cardholder side, Amex prohibits consumers from receiving truthful information and the price signals that they would ordinarily receive in a competitive market. The inefficient result is that an economically rational cardholder *should* prefer Amex and free-ride off the resulting higher prices for goods and services paid by all consumers.

The Sherman Act, as "the Magna Carta of free enterprise," outlaws such anticompetitive and distortionary conduct. *Topco Assocs.*, 405 U.S. at 610. Retailers and consumers should benefit from the "unrestrained interaction of competitive forces" in the market for credit card services, which "will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest

material progress." *N. Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958).

The district court found that enjoining Amex's NDPs would "inure to the benefit of both merchants and customers alike." Pet. App. 214a. Accordingly, "merchants actually are likely to steer customers between various forms of payment," for example, by offering free shipping, discounts, or a faster check-out line for using a cheaper payment card. *Id.* at 221a. And even if not all merchants exercise that new-found freedom, "[p]roviding merchants the freedom to participate in their customers' payment decisions will * * * restore downward pressure on [credit card networks'] merchant prices." *Id.* at 216a.

Merchants, in turn, "will pass along some amount of the savings associated with declining swipe fees to their customers in the form of lower retail prices." Pet. App. 220a. And whatever merchants do not pass on in cost decreases, they would pass on in quality improvements. Indeed, merchants would have to do so because they, unlike the credit card networks, operate in a highly competitive market and, in such a market, "all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695.

Finally, given the extended reach of the credit card industry, any such improvements have far-reaching potential. Credit cards today are ubiquitous in modern life, and one need only ask someone under the age of 25 to pay with cash or (dare we say) a personal check, to see that trend-line rising. And as

we move ever closer to a purely electronic economy the opportunities and incentives for those with market power to throttle competition will be manifold. This Court should not invite such abuses.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

Deborah White
RETAIL LITIGATION CENTER, INC. and RETAIL INDUSTRY LEADERS ASSOCIATION
1700 N. Moore Street
Arlington, VA 22209

Mark T. Stancil
Counsel of Record
Matthew M. Madden
D. Hunter Smith
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W., Ste. 411-L
Washington, D.C. 20006
(202) 775-4500
mstancil@robbinsrussell.com
Counsel for Retail Litigation Center, Inc., and National Association of Convenience Stores

Stephanie Martz
NATIONAL RETAIL FEDERATION
1101 New York Ave, N.W.
Washington, D.C. 20005

Alden L. Atkins
John P. Elwood
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW
Suite 500 West
Washington, D.C. 20037

Counsel for National Retail Federation

Stephanie K. Barnes
FOOD MARKETING INSTITUTE
2345 Crystal Drive,
Ste. 800
Arlington, VA 22202

Christopher Jones
NATIONAL GROCERS ASSOCIATION
1005 N. Glebe Road, Ste. 250
Arlington, VA 22201

William L. Taylor
TAYLOR & POWELL, PLLC
1455 Pennsylvania Avenue,
NW, Ste. 400
Washington, D.C. 20004
Counsel for National Association of Shell Marketers, Inc.

Tim Cheatham
WAL-MART STORES, INC.
702 S.W. 8th Street
Bentonville, AR 72716

David Steele
THE HOME DEPOT, INC.
2455 Paces Ferry Road NW
Atlanta, GA 30339

Robin L. Preble
TARGET CORPORATION
1000 Nicollet Mall
Minneapolis, MN 55403

Stephen L. Sitley
SEARS HOLDINGS MANAGEMENT CORPORATION
3333 Beverly Road
Hoffman Estates, IL 60179

Da[illegible]3. Goldston
JO-ANN STORES, LLC
5555 Darrow Road
Hudson, OH 44236

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